(6)

No. 99-1625-CFX Title: Tangipahoa Parish Board of Education, et al., Petitioners
v.
Herb Freiler, et al.

Docketed:
April 7, 2000 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Apr 7 2000	Petition for writ of certiorari filed. (Response due May 7, 2000)
	May 3 2000	Brief of respondents Herb Freiler and Sam Smith, Administrator in opposition filed.
	May 11 2000	Reply brief of petitioners Tangipahoa Parish Board of Education, et al. filed.
	May 16 2000	DISTRIBUTED. June 1, 2000
	Jun 5 2000	REDISTRIBUTED. June 8, 2000
	Jun 12 2000	REDISTRIBUTED. June 15, 2000
	Jun 19 2000	Petition DENIED. Dissenting opinion by Justice Scalia with whom the Chief Justice and Justice Thomas join. (Detached opinion.)

****

Supreme Court, U.S.
FILED
APR 07 2000
OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

TANGIPAHOA PARISH BOARD OF EDUCATION; E.F. BAILEY; ROBERT CAVES; MAXINE DIXON; LEROY HART; RUTH WATSON; DONNIE WILLIAMS, SR.; ART ZIESKE, in their capacities as members of the School Board; TED CASON, in his capacity as Superintendent of Schools,

Petitioners,

v.

HERB FREILER; SAM SMITH, individually and in his capacity as administrator of the estate of his minor child, Steven Smith; JOHN JONES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KENNETH F. SILLS
HAMMOND & SILLS
1111 South Foster Drive
Baton Rouge, Louisiana 70806
(225) 923-3462

CHRISTOPHER M. MOODY
CASHE, LEWIS, MOODY & COUDRAIN
106 South Magnolia Street
Hammond, Louisiana 70404
(504) 542-6848

BARRY W. ASHE
Counsel of Record
WILLIAM D. TREEBY
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON, L.L.P.
546 Carondelet Street
New Orleans, Louisiana 70130
(504) 581-3200

Attorneys for Petitioners

158717

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

10 pp

QUESTION PRESENTED

Whether a school board policy has the primary effect of advancing or endorsing religion in violation of the Establishment Clause, where that policy calls for public school teachers, before beginning a unit of study presenting the scientific theory of evolution, to read a disclaimer statement which: (1) notes that evolution as a theory of life's origin should be presented; (2) explains that, in doing so, the school board does not intend to influence or dissuade other opinions about life's origin, including the Biblical version of creation and other concepts (whether religious or secular); and (3) encourages students to exercise critical thinking and to gather all information possible in forming an opinion or in deciding to maintain currently held beliefs about life's origin.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	8
I. The Issue Presented In This Case Is Of Exceptional Importance To Students, Parents, And Educators, And Provides An Historic Opportunity For This Court To Quell The Persistent Controversy That Attends The Teaching Of Evolution In The Nation's Public Schools.	8
II. The Court Of Appeals' Decision That The Disclaimer Policy Endorses Religion, Or Has The Impermissible Effect Of Advancing Religion, Was Wrong.	12

Contents

	Page
A. The disclaimer policy does not have the principal or primary effect of advancing religion.	13
B. The disclaimer resolution does not endorse religion.	18
III. The Fifth Circuit Panel's Application Of *Lemon*'s "Effects" Prong Stands In Conflict With Prior Decisions Of This Court, Other Circuits, And The Fifth Circuit Itself.	22
Conclusion	24

TABLE OF CITED AUTHORITIES

Page

Cases:

ACLU v. Schundler, 168 F.3d 92 (3d Cir. 1999) .. 17

Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997 (1997) 22, 23

Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S. Ct. 3159 (1986) 16

Bown v. Gwinnett County School Dist., 112 F.3d 1464 (11th Cir. 1997) 17

Bridenbaugh v. O'Bannon, 185 F.3d 796 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 1267 (2000) 17

Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 115 S. Ct. 2440 (1995) 19

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 107 S. Ct. 2862 (1987) 15, 16

County of Allegheny v. ACLU, 492 U.S. 573, 109 S. Ct. 3086 (1989) 19

Doe v. Beaumont Independent School Dist., 173 F.3d 274, *reh'g granted*, 173 F.3d 313 (5th Cir. 1999) 22

Page

Doe v. Duncanville Independent School Dist., 70 F.3d 402 (5th Cir. 1995) 23

Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, *reh'g denied*, 171 F.3d 1013 (5th Cir.), *cert. granted*, 120 S. Ct. 494 (1999) 8, 9, 21, 22

Edwards v. Aguillard, 482 U.S. 578, 107 S. Ct. 2573 (1987) 10, 11, 12

Engle v. Vitale, 370 U.S. 421, 82 S. Ct. 1261 (1961) 16

Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266 (1968) 11, 12

Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) ... 19

Ganulin v. United States, 71 F. Supp. 2d 824 (S.D. Ohio 1999) 17

Granzeier v. Middleton, 173 F.3d 568 (6th Cir. 1999) 17

Hartman v. Stone, 68 F.3d 973 (6th Cir. 1995) ... 15

Helms v. Picard, 151 F.3d 347 (5th Cir. 1998), *cert. granted sub nom. Mitchell v. Helms*, 119 S. Ct. 2336 (1999) 22, 23

Page

Jones v. Clear Creek Independent School Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) 18, 21, 22, 23

Koenick v. Felton, 190 F.3d 259 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 938 (2000) 17, 23

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 113 S. Ct. 2141 (1993) 14

Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992) 21

Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971) 4, 5, 8, 12, 16, 17, 18, 19, 21, 22

Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355 (1984) 18, 19

Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330 (1983) 18

Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510 (1995) 15

Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927) 10, 11

Page

Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999), *appeal docketed*, No. 00-3055 (6th Cir. Jan. 12, 2000) 13

United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095 (1987) 18

West Virginia State Board of Ed. v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943) 11, 16

United States Constitution:

First Amendment 2

Fourteenth Amendment 2

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

Rule:

5TH CIR. R. 35.6 9

Page

Other Authorities:

Evolution and Kansas, Wash. Post, Aug. 16, 1999 9

Evolution Falls From Curriculum, N. Orleans Times-Picayune, Aug. 12, 1999 9

Gill, *Scientific Truth v. Religious Dogma*, N. Orleans Times-Picayune, Aug. 15, 1999 9

God and Man in Kansas, Wall St. J., Aug. 13, 1999 9

Goodman, *The Darwin Dumpers of Kansas*, N. Orleans Times-Picayune, Aug. 19, 1999 9

Gould, *Dorothy, It's Really Oz*, TIME, Aug. 23, 1999 9

C. HEMPEL, PHILOSOPHY OF NATURAL SCIENCE (1966) 18

O. HOLMES, THE COMMON LAW (1963) 18

Johnson, *The Church of Darwin*, Wall St. J., Aug. 16, 1999 9

Kansas Eliminates Evolution From Public School Curricula, Wash. Post, Aug. 12, 1999 9

Page

E. LARSON, SUMMER FOR THE GODS (1997) 11

Origin Theories Poll Finds Support, Associated Press, Mar. 11, 2000, 2000 WL 15788586 10

Poll: Americans Accept Evolution and Creationism, N. Orleans Times-Picayune, Mar. 11, 2000 10

K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1959) 18

Richards, *Darwinism and Design*, Wash. Post, Aug. 21, 1999 9

Teepen, *Maybe Kansas Isn't With Us Anymore*, N. Orleans Times-Picayune, Aug. 18, 1999 9

Wash. Times, Mar. 11, 2000 10

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Denying Petition For Rehearing Dated And Filed January 24, 2000 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated And Filed August 13, 1999 ..... 15a

Appendix C — Findings And Conclusions Of The United States District Court For The Eastern District Of Louisiana Dated And Filed August 8, 1997 ..... 36a

Petitioners, the Tangipahoa Parish School Board, its members, and the superintendent of schools, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit dated August 13, 1999, holding that a disclaimer resolution enacted by the School Board violates the Establishment Clause in that the resolution endorses religion or has the primary effect of advancing religion. *Freiler v. Tangipahoa Parish Board of Education*, 185 F.3d 337 (5th Cir. 1999), Appendix ("App.") B. The Fifth Circuit itself is deeply divided over the issue as reflected both by the 8 to 7 vote denying Petitioners' application for rehearing en banc and by the strong dissent joined by the seven judges who voted to have the full court hear the case. *Freiler v. Tangipahoa Parish Board of Education*, 201 F.3d 602 (5th Cir. 2000), App. A.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit holding the disclaimer resolution unconstitutional, entered August 13, 1999, is reported at 185 F.3d 337 and is reprinted as Appendix B. The Court of Appeals' denial of rehearing and rehearing en banc, entered January 24, 2000, including the dissenting opinion, is reported at 201 F.3d 602 and is reprinted as Appendix A. The memorandum opinion of the United States District Court for the Eastern District of Louisiana striking down the disclaimer resolution as unconstitutional for lack of a secular purpose, entered August 8, 1997, is reported at 975 F. Supp. 819 and is reprinted as Appendix C.

STATEMENT OF JURISDICTION

This petition for a writ of certiorari seeks review of the August 13, 1999 judgment of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit's jurisdiction over the appeal was founded upon 28 U.S.C. § 1291, because the district court had entered a final judgment from which Petitioners filed a timely notice of appeal. The district court's subject matter jurisdiction was founded upon 28 U.S.C. § 1331. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment of the Constitution of the United States of America, as applied to the states by the Fourteenth Amendment, provides in pertinent part: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

STATEMENT OF THE CASE

On April 19, 1994, the Tangipahoa School Board adopted the following resolution:

> Whenever, in classes of elementary or high school, the scientific theory of evolution is to be presented, whether from textbook, workbook, pamphlet, other written material, or oral presentation the following statement shall be quoted immediately before the unit of study begins as a disclaimer from endorsement of such theory.
>
> It is hereby recognized by the Tangipahoa Parish Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.
>
> It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion or maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.[1]

[1] Although the resolution is sometimes referred to as "the disclaimer" for ease of reference, only the second and third paragraphs (Cont'd)

The School Board deemed the disclaimer a nonintrusive means of sating the concerns of a diverse, pluralistic group of people, without altering the curriculum to teach theories about life's origin other than evolution and without in any manner trammeling the rights of students and their parents to form or maintain their own beliefs. The Board's objective in enacting the resolution was set forth in the text of the resolution itself — namely, to affirm each student's right to form or maintain his or her own opinions or beliefs about life's origin, notwithstanding the school system's intention to teach only the scientific theory of evolution.[2]

The plaintiffs sought to have the disclaimer resolution declared unconstitutional and to enjoin its implementation. On a stipulated record, the district court held that the disclaimer constituted an unconstitutional establishment of religion, reasoning that the resolution failed the first prong of the

(Cont'd)
of the resolution are contemplated to be read in the Tangipahoa Parish schools. Further, at the outset of this petition, it should be noted that the disclaimer addresses evolution only as a concept "regarding the origin of life and matter" (*i.e.*, the evolution of living things from nonliving matter), not as an explanation of the gradual process for the development of variations within the biological species of living things.

[2] In his closing remarks at the April 1994 Board meeting at which the disclaimer resolution was adopted, its proponent, E.F. Bailey, suggested that a student confronted with an evolution-only curriculum may well ask, "What about the other ideas? What about the other concepts?," or be compelled to accept as orthodox truth the only theory presented as part of the school curriculum ("I don't see how they could help but do it."), in the absence of a "mild disclaimer" which could "once and for all put the thing in perspective for our students." [Record at 1492.] The idea Mr. Bailey was attempting to articulate was that students who adhere to concepts of life's origin other than evolution should not be understood to be second-class citizens in the school community. This objective is secular, not religious, and does not advance religion, but instead advances the notion of tolerance — even if, in this instance, it may be tolerance by a minority of a majority. The virtue of tolerance should flow in both directions.

Lemon test requiring a secular purpose.[3] The district court entered judgment accordingly, enjoining the reading of the disclaimer in the Tangipahoa Parish public schools.

Petitioners appealed. In view of the district court's ruling, the briefing and oral argument before the Fifth Circuit panel focused upon the issue of whether the resolution had a secular purpose. On this issue, the Fifth Circuit agreed with the Petitioners and concluded that the resolution served at least two permissible secular purposes: (1) to disclaim any orthodoxy of belief that could be inferred from the exclusive place of evolution in the school curriculum; and (2) to reduce offense to the sensibilities and sensitivities of students and parents caused by the teaching of evolution.[4] The panel acknowledged "that local school boards need not turn a blind eye to the concerns of students and parents troubled by the teaching of evolution in public classrooms," 185 F.3d at 346, App. B at 27a, and that the secular objectives of the resolution are not rendered any less permissible because the subject addressed is "religiously charged" or the sensitivities and sensibilities accommodated "religious in nature." *Id.* at 345, App. B at 26a. Moving to the

[3] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971). Under the three-part *Lemon* test, a state practice is unconstitutional under the Establishment Clause if (1) it lacks a secular purpose; (2) its principal or primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion.

[4] The Fifth Circuit panel determined that a third purpose urged for the disclaimer — namely, to encourage informed freedom of belief and critical thinking — was a "sham" because the disclaimer, as the panel read it, actually sought to protect and maintain a particular religious viewpoint. 185 F.3d at 344, App. B at 25a. The panel fell into this error, however, because it misquoted and misread the text of the resolution. This error was compounded when the panel relied upon it in its analysis of the "effects" prong of the *Lemon* test, which is the context in which this petition will address it. Although the panel acknowledged its error upon denying the Petitioners' petition for rehearing en banc, the panel failed to amend its holding concerning this third secular purpose in light of an accurate reading of the disclaimer.

next prong of the *Lemon* test — the "effects" prong — the panel concluded "that the primary effect of the disclaimer is to protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation." *Id.* at 346, App. B at 28a. The panel thus affirmed the judgment of the district court, but on a different theory.

Petitioners sought rehearing en banc. The Fifth Circuit denied rehearing, but in a per curiam opinion, the panel first admitted that "the panel opinion misquoted the disclaimer's language" and then observed that the error "does not affect the outcome of this case." 201 F.3d at 603, App. A at 2a. The opinion is curious because, on the one hand, it appears to observe that disclaimers as a general proposition are constitutionally permissible ("In denying rehearing, we emphasize that we do not decide that a state-mandated statement violates the Constitution simply because it disclaims any intent to communicate to students that the theory of evolution is the only accepted explanation of the origin of life, informs students of their right to follow their religious principles, and encourages students to evaluate all explanations of life's origins, including those taught outside the classroom." *Id.*) — that is to say, the School Board wins! But then on the other hand, the per curiam opinion goes on to observe that there is something about the School Board's disclaimer that "under the facts and circumstances of this case . . . is not sufficiently neutral to prevent it from violating the Establishment Clause," *id.*[5] — that is to say, the School Board loses!

The dissenting opinion identified correctly "the facts and circumstances of this case" — specifically, a feature of the Board's disclaimer — that the Fifth Circuit majority deemed a sufficient breach of Establishment Clause neutrality as to snatch defeat for the Board from the jaws of victory. What are these offending "facts and circumstances"? What is that offending

[5] The dissenting opinion refers to this observation of the panel as "the disclaimer to the disclaimer." 201 F.3d at 604, App. A at 4a.

feature of the Board's disclaimer? The dissent observed: "[I]t mentions the Bible." *Id.* at 604, App. A at 5a.[6] The dissent explained that the disclaimer does so only to provide an illustration of an alternative ("other") concept of life's origin, *id.* at 607, App. A at 12a, and that the panel's contrary reading is "so erroneous and unwarranted it will be understood by some as being nothing less than hostile toward religion." *Id.* at 603, App. A at 3a. The dissent thus concluded:

> Based on my review of the record, the language of the disclaimer, and the context in which it was intended to be used, the primary effect of the disclaimer is not to advance religion; instead, it is to advance tolerance and respect for diverse viewpoints. The record reflects that, to the overwhelming majority of the parish[7] students, the scientific concept of evolution conflicts with their (or their parents') beliefs about the origin of life and matter; and its exclusive place in the curriculum had caused concern among students and parents. The disclaimer's message is one of respect for diverse viewpoints, informing students that teaching evolution as the sole concept for the origin of life and matter is not intended to influence or dissuade them from forming their own opinions about the subject or from maintaining beliefs taught by their parents.
>
> In examining the disclaimer's effect, the panel erred by not considering the context in which the disclaimer was intended to be used. In the parish schools, evolution is taught; the "Biblical version

[6] *See also id.* at 606-07, App. A at 11a (the mention of the Bible is "the hook on which the panel hangs its disclaimer to the disclaimer, denial of rehearing hat").

[7] In Louisiana, a "parish" is the political subdivision whose counterpart in the other forty-nine states is the county.

> of Creation" is not! How can the effect of the disclaimer be to endorse or advance a concept that is merely mentioned, using only four words, when evolution is the only concept for the origin of life and matter that is included in the curriculum, the only one that will be explained and discussed in any lesson following the disclaimer's being read?
>
> Understood and considered in the context in which it is intended to be used, the disclaimer expresses tolerance for the views of all students. A student who adheres to the concept of evolution and does not adhere to the Biblical version of creation is taught evolution; told the curriculum is not meant to disparage other concepts, including the Biblical version; and encouraged to think critically. Likewise, a student who adheres to the Biblical version and believes it to conflict with the concept of evolution is taught evolution; told the curriculum is not meant to disparage other concepts; and encouraged to think critically.
>
> . . . [T]he panel has transformed neutrality into intolerance.

Id. at 607-08, App. A at 12a-14a (footnote added).

REASONS FOR GRANTING THE WRIT

I. THE ISSUE PRESENTED IN THIS CASE IS OF EXCEPTIONAL IMPORTANCE TO STUDENTS, PARENTS, AND EDUCATORS, AND PROVIDES AN HISTORIC OPPORTUNITY FOR THIS COURT TO QUELL THE PERSISTENT CONTROVERSY THAT ATTENDS THE TEACHING OF EVOLUTION IN THE NATION'S PUBLIC SCHOOLS.

This case involves a question of exceptional importance — namely, whether a School Board may act to reduce the possibility of offense occasioned by the teaching of evolution in public schools without running afoul of the Establishment Clause. The dissent from the Court of Appeals' denial of rehearing en banc highlighted the importance of the issue, observing:

> For the second time in less than a year, our court has refused to grant rehearing en banc to consider application of the Establishment Clause of the First Amendment to *issues of exceptional importance to students, parents, and educators. See Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (holding unconstitutional, *inter alia*, student-led prayers before football games), *reh'g denied*, 171 F.3d 1013 (5th Cir.), *cert. granted*, ___ U.S. ___, 120 S. Ct. 494, 145 L. Ed. 2d 381 (1999).

Freiler, 201 F.3d at 603, App. A at 3a (emphasis added). This Court apparently agreed with the dissent's assessment of the importance of the issue in *Doe v. Santa Fe* (a school district policy concerning student-led prayers as a violation of the Establishment Clause under *Lemon's* "purpose" prong), because this Court granted review in that case. This Court should accept the dissent's assessment of the importance of the issue presented in this case as well, especially since this case poses the opportunity to address the "effects" prong of *Lemon* in the context of the School Board's disclaimer policy (a different and

equally vital Establishment Clause issue from the one presented in *Doe v. Santa Fe*). That the Fifth Circuit was so deeply divided over the disclaimer policy (voting 8 to 7 to deny rehearing)[8] also demonstrates the exceptional importance of the issue presented in this case.

The command of the Establishment Clause is that government may neither teach religious tenets nor compel religious beliefs. Government must, in short, remain neutral on the validity of religious claims about such profound issues as the origin of life. This does not require the government to move in the direction that the Kansas Board of Education recently did, excising evolution from statewide standardized testing — an action that sparked a national furor.[9] Left unaddressed, this controversy, which has long accompanied the teaching of

---

[8] Notably, one of the judges voting in the majority to deny rehearing was a senior judge who was a member of the panel that originally decided the case. By Fifth Circuit rule, such a senior judge is allowed to participate in the vote on an en banc poll. 5TH CIR. R. 35.6. Otherwise, the vote would have been evenly divided at 7 to 7. Thus, if the panel had been composed of three of the judges joining the dissent rather than three from the majority, the equally divided en banc vote would have sustained the disclaimer. Resolution of an issue of this importance should not be left to hinge on the draw of an appellate panel.

[9] *Kansas Eliminates Evolution From Public School Curricula*, Wash. Post, Aug. 12, 1999, at A13; *Evolution Falls From Curriculum*, N. Orleans Times-Picayune, Aug. 12, 1999, at A21; *God and Man in Kansas*, Wall St. J., Aug. 13, 1999, at W11; Gill, *Scientific Truth v. Religious Dogma*, N. Orleans Times-Picayune, Aug. 15, 1999, at B7; *Evolution and Kansas*, Wash. Post, Aug. 16, 1999, at A14; Johnson, *The Church of Darwin*, Wall St. J., Aug. 16, 1999, at A14; Teepen, *Maybe Kansas Isn't With Us Anymore*, N. Orleans Times-Picayune, Aug. 18, 1999, at B7; Goodman, *The Darwin Dumpers of Kansas*, N. Orleans Times-Picayune, Aug. 19, 1999, at B7; Richards, *Darwinism and Design*, Wash. Post, Aug. 21, 1999, at A19; Gould, *Dorothy, It's Really Oz*, TIME, Aug. 23, 1999, at 59.

evolution in public schools, shows no signs of receding.[10] By the same token, the neutrality required by the Establishment Clause does not require the invalidation of the policy at issue here, which simply authorizes a short statement to be read before the teaching of evolution — a statement which, in part, recites that evolution should be taught, all in conformity with this Court's ruling in *Edwards v. Aguillard*, 482 U.S. 578, 107 S. Ct. 2573 (1987). The intent of this statement was to clarify that the School Board does not disparage anyone's faith, but simply encourages critical thinking and reflection about one of the most profound questions in the interaction of religion and science.

The Board respectfully submits that this Court's reversal of the panel opinion, reinstating the disclaimer policy, would prove an historic step in quelling the controversy. Reinstatement of this moderate policy will allow evolution to be taught in the Tangipahoa Parish public schools with minimal offense, simply by allowing governmental acknowledgment of the people's inalienable right to form their own opinions concerning the issue of life's origin.

This is not a case about the relative merits of creationism versus evolution. It is not *Scopes Revisited*[11] or even *Aguillard*

[10] *Poll: Americans Accept Evolution and Creationism*, N. Orleans Times-Picayune, Mar. 11, 2000, at A1 (reviewing results of poll concerning the teaching of evolution in public schools; quoting several scientists that public acceptance of both evolution and creation as theories of life's origin is "logically inconsistent" because they represent "incompatible world views"; and noting that the debate over teaching evolution in public schools "shows no sign of cooling" given the action of the Kansas board of education in 1999); *Origin Theories Poll Finds Support*, Associated Press, Mar. 11, 2000, 2000 WL 15788586; Wash. Times, Mar. 11, 2000, at A2.

[11] *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927). Of course, notwithstanding the popular misconceptions of the famous "monkey trial," at least as portrayed in the legendary version of the play and (Cont'd)

Redux.[12] Instead, it is a case about a School Board's effort to create a classroom environment comfortable enough for *all* students to learn what they should learn. To be sure, the disclaimer does take into account the sensibilities of students who may be adherents of religious views ostensibly in conflict with the theory of evolution. But it does so to avoid the dissonance for these students occasioned by the teaching of evolution and to disclaim any message of official orthodoxy,[13] which could be perceived by evolution's exclusive place in the curriculum. Thus, the School Board saw fit to require the reading of a disclaimer which recognized both that evolution would be taught in the school system and that, in doing so, the Board did not mean to dictate to students what they should believe concerning life's origin.

This Court has not often been called upon to address issues concerning the controversy over the teaching of evolution in

(Cont'd)
movie *Inherit the Wind*, Mr. Scopes was convicted and fined a nominal amount under the statute at issue. On appeal, the Tennessee supreme court overturned the fine on a technicality but held that the statute, which prohibited the teaching of evolution, was constitutional. For an engaging and Pulitzer Prize-winning account of the *Scopes* trial and its significance, see E. LARSON, SUMMER FOR THE GODS (1997). Forty years elapsed after *Scopes* before this Court in *Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266 (1968), invalidated a statute that forbid the teaching of evolution in public schools.

[12] *Edwards v. Aguillard*, 482 U.S. 578, 107 S. Ct. 2573 (1987) (invalidating Louisiana's Balanced Treatment Act, which required that creation science be taught if evolution were taught, or that evolution not be taught at all).

[13] *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 641, 63 S. Ct. 1178, 1186 (1943) ("Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.").

public schools, but it has not recoiled from doing so to resolve issues of exceptional importance raised by attempts to deal with the controversy. Thus, the Court acted to strike down statutes that criminalized the teaching of evolution and that required the teaching of creation science to balance the teaching of evolution in public schools. In a very real sense, *Freiler* represents the third and crucial case in the trilogy of cases — along with *Epperson* and *Aguillard* — that will bring a balanced constitutional order (and perhaps peace) to the controversy. *Epperson* and *Aguillard* required this Court to strike down statutes attempting to address the controversy in an unconstitutional manner. In contrast, *Freiler* presents this Court with an opportunity to uphold a reasonable, balanced and constructive means of dealing with the thorny and persistent issue posed by the teaching of evolution in public schools, thereby facilitating a truce in this alleged battle between faith and science. Accordingly, because of the exceptional importance of the issue posed in this case, this Court should grant the petition for a writ of certiorari.

II. THE COURT OF APPEALS' DECISION THAT THE DISCLAIMER POLICY ENDORSES RELIGION, OR HAS THE IMPERMISSIBLE EFFECT OF ADVANCING RELIGION, WAS WRONG.

Originally, the School Board thought this simple case would afford federal courts an opportunity to bring a large dose of moderation and common sense to interpretations of the purpose prong of the *Lemon* test. And that it has done, with the panel's reversal of the district court's conclusion that the disclaimer was without a permissible secular purpose. But the panel itself fell into error in applying the "effects" prong of the *Lemon* test. And the en banc Fifth Circuit has declined to correct the error. Accordingly, this case now presents this Court with an opportunity to bring clarity and moderation to interpretations of the "effects" prong — an

area of Establishment Clause jurisprudence of increasing importance.[14]

A. The disclaimer policy does not have the principal or primary effect of advancing religion.

The Fifth Circuit panel misread (and actually misquoted) the text of the disclaimer resolution. The first sentence of the third paragraph of the resolution recites the School Board's acknowledgment "that it is the basic right and privilege of each student to form his/her own opinion *or* [*not* 'and' as the panel quoted] maintain beliefs taught by parents on [the] . . . matter of the origin of life and matter." The distinction between use of the disjunctive as opposed to the conjunctive was in the first instance critical for the panel. Thus, in rejecting as a sham the proffered purpose of encouraging critical thinking, the panel emphasized the disclaimer's recognition of the right to "maintain beliefs" but, by misquoting the disclaimer, the panel negated the disclaimer's recitation of the parallel and separate right to "form opinions." Critical thinking is essential to the latter but it was wholly ignored as a legitimate purpose by the panel due to the panel's mistakenly selective quotation of the resolution.[15] It is true then, as the panel observed, that from the disclaimer's wording, "school children hear that evolution as taught in the classroom *need not* affect what they already know," 185 F.3d at 345, App. B at 25a (emphasis added), but they also hear (although the panel failed to recognize it) that it can!

The Fifth Circuit panel's misreading of the text of the resolution also directly led to its erroneous conclusion that

---

[14] *See, e.g., Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999) (invalidating Cleveland's voucher program as having the effect of advancing religion), *appeal docketed*, No. 00-3055 (6th Cir. Jan. 12, 2000). *See also* cases cited *infra* at note 19.

[15] Regardless, if a belief, even a preexisting one, is to be informed, then critical thinking is just as essential to its "maintenance" — that is, to its surviving the scrutiny attending any challenge to it by competing ideas — as to its formation.

"the primary effect of the disclaimer is to *protect and maintain* a particular religious viewpoint, namely belief in the Biblical version of creation." *Id.* at 346, App. B at 28a (emphasis added). Contrary to the panel's holding, adoption of the disclaimer resolution presented "no realistic danger that the community would think that the [School Board] was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 395, 113 S. Ct. 2141, 2148 (1993). The principal or primary effect of the disclaimer is to communicate to students that they are free to *form* their own opinions *or* maintain beliefs taught by parents concerning the issue of life's origin. Students are encouraged to investigate the issue and to engage in critical thinking in drawing conclusions. In other words, the disclaimer resolution does not advance religion but advances freedom of thought, as well as sensitivity to and tolerance for diverse beliefs in a pluralistic society.

Thus, one factor cited by the Fifth Circuit panel for its holding (*viz.*, the reminder that students have the right to maintain beliefs taught by their parents regarding the origin of life) springs directly from the panel's misquoting of the disclaimer, reading "or" as "and." A second factor cited by the panel (*viz.*, that the disclaimer "encourages students to read and meditate upon religion in general and the 'Biblical version of Creation' in particular") similarly springs from a further misreading of the resolution. The disclaimer encourages examination of "each alternative" theory of life's origin (including evolution itself), *not* merely alternatives "to evolution" as the panel suggested. Thus, to arrive at its conclusion that students are encouraged to read and meditate upon religion, the panel was forced to rewrite the language of the resolution, and then to assume that all "alternatives *to* evolution" are religious in nature.[16]

[16] Of course, nonreligious theories of life's origin include the Big Bang theory and the theory of panspermia, as well as evolution. *Freiler*, 201 F.3d at 607, App. A at 12a.

Finally, in citing use of the phrase, "Biblical version of creation," as the third factor underlying its holding that the disclaimer has the effect of advancing religion, the Fifth Circuit panel failed to appreciate the phrase as a widely understood illustration, rather than endorsement of an alternative theory. For the Board's Tangipahoa Parish constituency, the illustration lent meaning to the general phrase "other concepts" that follows it in the resolution.[17] It is perfectly permissible under the law for references to the "Bible" to be made for illustrative purposes in legislation, regulation and other governmental pronouncements. *See, e.g., Hartman v. Stone*, 68 F.3d 973, 977 & n.1 (6th Cir. 1995) (denoting regulation's reference to "Bible" as illustrative only).[18]

Of course, many, but not all, competing notions about life's origin may be deemed religious in nature. But any benefit to religion conveyed by the resolution is incidental to the government's policy of teaching evolution and simultaneously assuring students of their freedom to believe as they see fit as regards this sensitive issue — a disclaimer of orthodoxy that is secular, religion-neutral and soundly constitutional. *See Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 2524 (1995) (decrying "specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy"); *Corporation of the Presiding Bishop of the Church*

[17] What may be an apt illustrative reference in one area of the country (*e.g.*, Utah), may not be so in another area (*e.g.*, an Indian reservation). In other words, the predominant religious or cultural beliefs of the audience may suggest that a different illustration may more readily provide content to a general phrase used in legislation, regulation or other governmental pronouncements. But the illustration itself does not amount to an "establishment" of the religion whose theory or sacred text happens to be used in illustration.

[18] Another example is President Clinton's July 1995 speech regarding "religious expression in public schools," in which he used the term "Bible" for illustrative purposes. *See* Record at 1514.

of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 337, 107 S. Ct. 2862, 2869 (1987) ("A law is not unconstitutional simply because it *allows* churches to advance religion. . . . For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities or influence."); *West Virginia State Board of Ed. v. Barnette*, 319 U.S. at 642, 63 S. Ct. at 1187 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). In enacting the disclaimer resolution, the School Board simply acted to avoid a specter of a "baseline standard of secular orthodoxy," and such action did not have the principal or primary effect of advancing religion.

The disclaimer resolution at issue here does not discredit evolution but affirms that evolution should be taught. It does not encourage belief in religious alternatives, but acknowledges that students may have such beliefs or adhere to "other concepts" concerning the origin of life and matter. The resolution merely communicates a message that the authority of the state in teaching evolution is not to be construed as disapproval of those who adhere to concepts different from evolution. In other words, the resolution was intended to remove indirect coercive pressure upon nonadherents to the theory of evolution to conform to what might otherwise be perceived as the prevailing officially approved theory incorporated into the school curriculum. Such a design has a sound constitutional foundation. *Cf. Engle v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1961) (indicating government is to avoid requiring conformance to any such orthodoxy); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681, 106 S. Ct. 3159, 3163 (1986) ("public education must prepare pupils for citizenship in the Republic" by taking "into account consideration of . . . the sensibilities of fellow students").

Moreover, to run afoul of *Lemon*'s second prong, the resolution must be construed to have *the principal or primary* effect of advancing religion. But the primary effect of the resolution is to advance the secular purposes upheld by the Fifth Circuit — namely, to disclaim orthodoxy and to encourage sensitivity to and tolerance for diverse beliefs in a pluralistic society. Any benefit to religion conferred by the resolution is incidental to the advancement of these approved purposes.[19]

In this case, the Fifth Circuit recognized a legitimate purpose for the disclaimer policy, but invalidated the policy

---

[19] *See also Koenick v. Felton*, 190 F.3d 259, 267 (4th Cir. 1999) (holding that Good Friday as legal holiday did not advance religion; "A statute whose primary effect is to advance a secular purpose, rather than a religious one, is still constitutional even if it conveys an incidental benefit to those of a specific religion."), *cert. denied*, 120 S. Ct. 938 (2000); *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 802 (7th Cir. 1999) (same holding; observing that "any benefit to religion flowing from the Good Friday holiday is indirect, remote and incidental to the primary secular purpose for the holiday"), *cert. denied*, 120 S. Ct. 1267 (2000); *Granzeier v. Middleton*, 173 F.3d 568, 575-76 (6th Cir. 1999) (same holding; observing that policy of school closings on religious holidays was not "for religious reasons" but rather constituted "a secular recognition of the practicalities of school or court attendance that might otherwise be disrupted"); *id.* at 578 (concurring opinion noting with respect to the holiday "that particular circumstances of religious significance are intertwined with secular considerations" so as to avoid constitutional infirmity); *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999) (holding that holiday display communicated "message of pluralism and freedom to choose one's own beliefs," offering no greater aid to religion than forms of aid to students attending church-related schools and colleges, tax exemptions for church property, Sunday Closing laws, "release time" programs, and legislative prayers previously upheld by Supreme Court); *Bown v. Gwinnett County School Dist.*, 112 F.3d 1464, 1472-73 (11th Cir. 1997) (statute requiring period of quiet reflection in public schools did not have principal or primary effect of advancing religion); *Ganulin v. United States*, 71 F. Supp. 2d 824, 833-35 (S.D. Ohio 1999) (holding that Christmas Day as legal holiday did not advance religion).

because of its perceived "effect." There is no evidence in the record for this conclusion because the disclaimer has never been read. This conclusion, in short, is conclusory, based on a surmise or a fear or what might happen if the disclaimer were ever read. Thus, the plaintiffs' challenge to the disclaimer resolution is a facial challenge, not an "as applied" challenge.[20] The "effects" prong of the *Lemon* test is susceptible to misuse by courts, allowing them to leap from a permissible purpose to an impermissible effect that has never been observed.[21] That courts are free to do so under the *Lemon* test marks one of its weaknesses. In making the leap to strike down the disclaimer resolution in this case, the Fifth Circuit erred. The disclaimer resolution does not transgress *Lemon's* second prong.

B. The disclaimer resolution does not endorse religion.

Government action that is "simply a tolerable acknowledgment of beliefs widely held among the people of this country" is not an unconstitutional "establishment" of religion. *Marsh v. Chambers*, 463 U.S. 783, 792, 103 S. Ct. 3330, 3336 (1983). In *Lynch v. Donnelly*, the Supreme Court

---

[20] A facial challenge requires that courts must not condemn the challenged policy unless there is no way to implement it in a constitutional manner. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *Jones v. Clear Creek Ind. Sch. Dist.* ("*Clear Creek II*"), 977 F.2d 963, 969 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

[21] If empirical observation is a hallmark of science, *see* K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1959); C. HEMPEL, PHILOSOPHY OF NATURAL SCIENCE (1966), then cases like this one, applying the "effects" prong of the *Lemon* test in the absence of any experience, are no better support for the aphorism that jurisprudence is more art than science. Justice Holmes would be disappointed. O. HOLMES, THE COMMON LAW 5 (1963) ("The life of the law has not been logic; it has been experience.").

instructed that "taking official note of . . . our religious heritage" is not an unconstitutional endorsement of religion. 465 U.S. 668, 686, 104 S. Ct. 1355, 1366 (1984).[22] Because the disclaimer resolution on its face recognizes freedom of belief for adherents to both secular and religious theories, it is clear that the resolution neither endorses nor disapproves of religion, but merely "tak[es] official note of" religious and other theories of life's origin. At most, this is acknowledgment, not endorsement.

In *County of Allegheny v. ACLU*, this Court collapsed the first and second prongs of the *Lemon* test into the single inquiry of "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." 492 U.S. 573, 592 , 109 S. Ct. 3086, 3100 (1989).

> A government statement "that religion or a particular religious belief is favored or preferred," . . . violates the prohibition against establishment of religion because such "[e]ndorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the community."

Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 773, 115 S. Ct. 2440, 2452 (1995) (citations omitted).

The key in determining whether a particular government action has the effect of endorsing religion is an analysis of the action from the perspective of a "reasonable observer." Not a mere casual passerby, this reasonable observer is deemed to be aware of the history and context of the community and forum

---

[22] *See also Florey v. Sioux Falls School Dist.*, 619 F.2d 1311, 1318-19 (8th Cir.) (upholding school board policy regarding observance of holidays, religious and secular, observing that schools should use religious holiday observances to foster among students and parents mutual respect for and understanding of diverse cultural, ethnic and religious backgrounds represented in society), *cert. denied*, 449 U.S. 987 (1980).

in which the action takes place. In this case, the reasonable observer would be deemed aware of the Bible's religious significance and the school system's connection with government, as well as the required place of evolution in the school system's curriculum and the history of controversy sparked by the teaching of evolution in public schools in America. The reasonable observer would also be deemed aware of the divergence of beliefs among people in Tangipahoa Parish concerning life's origin.

With this knowledge, no reasonable observer could mistake the wording of the disclaimer resolution as an impermissible "endorsement" of religion. The disclaimer expressly advises students of their "right and privilege . . . to form his/her own opinion *or* maintain beliefs taught by parents [concerning] the origin of life and matter," with the admonition that "[s]tudents are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion." The resolution does not prefer or favor a religious view of life's origin over secular views of life's origin. Nor does it endorse the Biblical version of creation over evolution. While the resolution does disclaim an official evolution-only orthodoxy, it does not in any way denigrate or disfavor the concept of evolution within the sphere of ideas, theories, beliefs or opinions that students may choose to hold. Rather, a reasonable observer would read or hear the disclaimer as affirming his or her freedom to make that individual choice.

This case is particularly well suited to an application of the endorsement test, because the Fifth Circuit held that the disclaimer resolution had at least two permissible secular purposes but also held that the resolution nevertheless had the impermissible effect of advancing religion. If the secular purposes are not rendered any less permissible because the subject addressed is "religiously charged" or the sensibilities accommodated "religious in nature," *Freiler*, 185 F.3d at 345, App. B at 26a, how can the resolution be said to have the impermissible effect of advancing religion? Because the

endorsement test merges the first and second prongs of the *Lemon* test into a single inquiry, review of the Fifth Circuit's disposition of the disclaimer resolution presents this Court with an opportunity for advancement of the endorsement test. The School Board is confident that the endorsement test will prove particularly appropriate in a case such as this one where the disclaimer resolution's purposes and its theoretical effects are not meaningfully distinguishable.

In short, the School Board submits that the central message of the disclaimer resolution is that there are no outsiders or insiders, no one who is favored or disfavored, on the issue of life's origin, but persons of all viewpoints are full members in the school community. The resolution forces no student to adhere to a particular theory concerning the origin of life and matter, and the mere mention of "the Biblical version of creation" by way of illustration does not present a significant risk of perceived "endorsement" of Bible-based religion in light of the general context in which the "reasonable student" or other reasonable observer will hear and perceive the disclaimer. Accordingly, this case presents this Court with the opportunity of further explaining its "endorsement test" by applying the test to sustain the constitutionality of the School Board's disclaimer policy.[23]

---

[23] This Court's coercion test is not implicated by the disclaimer resolution because it does not involve "a formal religious exercise." *See Doe v. Santa Fe*, 168 F.3d at 814 (citing *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992); *Clear Creek II*, 977 F.2d at 970).

III. THE FIFTH CIRCUIT PANEL'S APPLICATION OF *LEMON*'S "EFFECTS" PRONG STANDS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT, OTHER CIRCUITS, AND THE FIFTH CIRCUIT ITSELF.

In its application of the "effects" prong of the *Lemon* test to the School Board's disclaimer policy, the Fifth Circuit panel's decision conflicts with Establishment Clause principles set forth in this Court's decision in *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997 (1997), and the Fifth Circuit's prior decisions in *Jones v. Clear Creek Independent School Dist.*, 977 F.2d 963 (5th Cir. 1992) ("*Clear Creek II*"), *cert. denied*, 508 U.S. 967 (1993), and *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998), *cert. granted sub nom. Mitchell v. Helms*, 119 S. Ct. 2336 (1999). The dissent from the denial of rehearing agreed, explaining:

> . . . I joined the dissent from the denial of rehearing in *Santa Fe*, and respectfully dissent from this denial, because I believe our court's recent Establishment Clause jurisprudence is not only inconsistent with Supreme Court precedent, as well as ours, but is also so erroneous and unwarranted it will be understood by some as being nothing less than hostile toward religion.

Freiler, 201 F.3d at 603, App. A at 3a (citing *Doe v. Santa Fe Independent School Dist.*, 168 F.3d 806, *reh'g denied*, 171 F.3d 1013 (5th Cir.), *cert. granted*, 120 S. Ct. 494 (1999); *Doe v. Beaumont Independent School Dist.*, 173 F.3d 274, *reh'g granted*, 173 F.3d 313 (5th Cir. 1999)).

The Fifth Circuit panel's application of the "effects" prong to strike down the disclaimer is at odds with the ruling of another panel of the Fifth Circuit in *Clear Creek II* that a school policy "can only advance religion by increasing religious conviction among [school] attendees, which means attracting new believers or increasing the faith of the faithful." 977 F.2d at 967. The disclaimer at issue here does neither because it does not

teach or inculcate anything religious. Like the prayer at issue in *Clear Creek II*, "no one would likely expect the advancement of religion by the initiation or increase of religious faith through" the reading of the disclaimer. *Id.* Instead, the disclaimer communicates a message of acceptance and tolerance to all members of the school community no matter their view of life's origin. Thus, as in *Clear Creek II*, the resolution's primary effect, like its purpose, is secular.

Further, because the disclaimer affords, on a neutral basis, tolerance and acceptance to adherents of all views of life's origin, and makes such acceptance "available to both religious and secular beneficiaries on a nondiscriminatory basis," the disclaimer is like the nonindoctrinating financial aid for the programs upheld in *Agostini*, 117 S. Ct. at 2014-16, and *Helms*, 151 F.3d at 357-59, 363-66. As a consequence, the disclaimer does not have the effect of advancing religion, nor of creating an excessive entanglement. In this sense, the Fifth Circuit panel's decision in *Freiler* stands in conflict with *Agostini* and *Helms*.[24]

Finally, the panel's application of the "effects" prong is inconsistent with the jurisprudence of other Circuits establishing that governmental action "whose primary effect is to advance a secular purpose, rather than a religious one, is still constitutional even if it conveys an incidental benefit to . . . religion." *Koenick v. Felton*, 190 F.3d at 267. *See* cases collected *supra* note 19.

Thus, the Fifth Circuit's reasons for striking down the disclaimer resolution as an establishment of religion conflict with prior decisions of both this Court, other Circuits, and the Fifth Circuit itself holding that an incidental benefit to religion does not amount to an advancement of religion. The petition

---

[24] The panel's decision also runs counter to the Fifth Circuit's own admonition in *Doe v. Duncanville Independent School Dist.*, 70 F.3d 402, 406 n.4 (5th Cir. 1995), that the Establishment Clause does not prevent a school system "from treating students' religious beliefs and practices with deference and respect; indeed, the constitution requires this."

for a writ of certiorari should be granted to correct the Fifth Circuit's erroneous interpretation and to maintain uniformity with this Court's decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BARRY W. ASHE
Counsel of Record
WILLIAM D. TREEBY
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON, L.L.P.
546 Carondelet Street
New Orleans, Louisiana 70130
(504) 581-3200

KENNETH F. SILLS
HAMMOND & SILLS
1111 South Foster Drive
Baton Rouge, Louisiana 70806
(225) 923-3462

CHRISTOPHER M. MOODY
CASHE, LEWIS, MOODY & COUDRAIN
106 South Magnolia Street
Hammond, Louisiana 70404
(504) 542-6848

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 24, 2000

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 97-30879, 98-30132

HERB FREILER; SAM SMITH, Individually and in his capacity as Administrator of the Estate of his minor child Steven Smith; JOHN JONES,

Plaintiffs-Appellees,

v.

TANGIPAHOA PARISH BOARD OF EDUCATION; E.F. BAILEY; ROBERT CAVES; MAXINE DIXON; LEROY HART; RUTH WATSON; DONNIE WILLIAMS, SR.; ART ZIESKE, Individually and in their capacities as members of the School Board; TED CASON, Individually and in his capacity as Superintendent of Schools,

Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC
(Opinion 8/13/99, 5th Cir., 1999, 185 F.3d 337)

Appendix A

Before KING, Chief Judge, and POLITZ and BENAVIDES, Circuit Judges.

PER CURIAM:

The School Board contends that the panel opinion misquoted the disclaimer's language, substituting *and* for *or* in a disclaimer passage. The School Board is correct. The particular passage as stated in the disclaimer reads as follows:

> "It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion *or* maintain beliefs taught by parents on this very important matter of the origin of life and matter."

The improper substitution of "and" for "or" does not affect the outcome of this case.

In denying rehearing, we emphasize that we do not decide that a state-mandated statement violates the Constitution simply because it disclaims any intent to communicate to students that the theory of evolution is the only accepted explanation of the origin of life, informs students of their right to follow their religious principles, and encourages students to evaluate all explanations of life's origins, including those taught outside the classroom. We decide only that under the facts and circumstances of this case, the statement of the Tangipahoa Parish School Board is not sufficiently neutral to prevent it from violating the Establishment Clause.

Appendix A

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed.R.App.P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

RHESA HAWKINS BARKSDALE, Circuit Judge, joined by E. GRADY JOLLY, PATRICK E. HIGGINBOTHAM, EDITH H. JONES, JERRY E. SMITH, EMILIO M. GARZA and HAROLD R. DeMOSS, JR., Circuit Judges, dissenting from the denial of rehearing en banc:

For the second time in less than a year, our court has refused to grant rehearing en banc to consider application of the Establishment Clause of the First Amendment to issues of exceptional importance to students, parents, and educators. *See* ***Doe v. Santa Fe Indep. Sch. Dist.***, 168 F.3d 806 (holding unconstitutional, *inter alia*, student-led prayers before football games), *reh'g denied*, 171 F.3d 1013 (5th Cir.), *cert. granted*, __ U.S. __, 120 S. Ct. 494 (1999). I joined the dissent from the denial of rehearing in ***Santa Fe***, and respectfully dissent from this denial, because I believe our court's recent Establishment Clause jurisprudence is not only inconsistent with Supreme Court precedent, as well as ours, but is also so erroneous and unwarranted it will be understood by some as being nothing less than hostile toward religion. *See* ***id.***; ***Doe v. Beaumont Indep. Sch. Dist.***, 173 F.3d 274, *reh'g granted*, 173 F.3d 313 (5th Cir. 1999).

Appendix A

The panel strikes down a disclaimer from endorsement of the theory of evolution (the disclaimer), required to be read in Tangipahoa Parish schools at the start of a lesson on evolution. ***Freiler v. Tangipahoa Parish Bd. of Educ.***, 185 F.3d 337 (5th Cir. 1999). Among other things, the disclaimer advises students that the lesson is "presented to inform [them] of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept". The panel holds the disclaimer unconstitutional for *not* being neutral. ***Id.*** at 345-48.

But, in seeking to enforce constitutionally mandated neutrality, the panel has strayed, no doubt unintentionally, onto a path of intolerance. *See* ***Lynch v. Donnelly***, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"). Unfortunately, notwithstanding this case being one of "exceptional importance", as well as there being the necessity "to secure or maintain uniformity of [our] court's decisions", the very fodder for granting en banc rehearing pursuant to FED. R. APP. P. 35(a), our court does *not* think it necessary.

Immediately preceding this dissent is the statement crafted by the panel to explain why the disclaimer fails. Surely, that is the role of the opinion. In any event, this vague, good news for everyone statement (the disclaimer to the disclaimer) may provide comfort to those members of our court reluctant to allow en banc rehearing. We are now seemingly assured that, in general, disclaimers somewhat similar to the one at issue are constitutionally permissible;

Appendix A

but informed that, "under the facts and circumstances of this case, the statement of the Tangipahoa Parish School Board is not sufficiently neutral to prevent it from violating the Establishment Clause".

With all due respect to the panel, this disclaimer to the disclaimer, while possibly being the balm necessary to save this case from being reheard en banc, does far more harm than good. For this extremely important and sensitive area of the law *and of life*, it does nothing but muddy the waters even more. (For starters, what does "not sufficiently neutral" mean?) Someone trying to harmonize the panel's holding about the disclaimer and its disclaimer to the disclaimer could conclude, quite justifiably, that the disclaimer does *not* pass muster because of one simple fact: it mentions the Bible. Whether that be the panel's holding, or that be the reader's conclusion, there is consistency in one sense — each result should be of great concern to our court. Sadly, it does *not* appear to be so.

The now-operative disclaimer to the disclaimer was prompted by the panel holding that the Establishment Clause does *not* permit a teacher, at the start of a lesson on evolution, to read a statement informing students that the lessons are *not* intended to dissuade their beliefs in alternative concepts of the origin of life and matter; urging them to think critically about evolution and such alternative concepts; and reminding them of their right to form their own opinions *or* to maintain beliefs taught by their parents. (Interestingly, what the disclaimer to the disclaimer suggests would be permissible tracks the disclaimer quite closely.)

Appendix A

The disclaimer is required by the following resolution adopted in 1994 by the Tangipahoa Parish School Board:

> Whenever, in classes of elementary or high school, the scientific theory of evolution is to be presented, whether from textbook, workbook, pamphlet, other written material, or oral presentation the following statement shall be quoted immediately before the unit of study begins as a *disclaimer from endorsement of such [evolution] theory*.
>
> It is hereby recognized by the Tangipahoa Parish Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and *should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept*.
>
> It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion *or* maintain beliefs taught by parents on this very important matter of the origin of life and matter. *Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion*.

(Emphasis added.) The panel opinion, in quoting the disclaimer, erroneously uses "and" instead of "or" in the

Appendix A

above passage about a student's right "to form his/her own opinion *or*", *not and*, "maintain beliefs taught by [his/her] parents". 185 F.3d at 341. The disclaimer to the disclaimer acknowledges this error, but states that it "does not affect the outcome of this case".

The School Board advanced three purposes for the disclaimer: "(1) to encourage informed freedom of belief, (2) to disclaim any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum, and (3) to reduce offense to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution". ***Id.*** at 344. The panel concluded that the second and third purposes were permissible secular objectives. ***Id.*** at 345.

But, in a holding that overlaps with its holding that the disclaimer is *not* neutral, discussed *infra*, the panel decided that the first purpose was a "sham", concluding that the disclaimer furthered a contrary purpose: "the protection and maintenance of a particular religious viewpoint". ***Id.*** at 344-45. In so doing, the panel interpreted the message of the disclaimer as telling students that "evolution as taught in the classroom need *not* affect what they already know"; and that this was "contrary to an intent to encourage critical thinking, which requires that students approach new concepts with an open mind and a willingness to alter and shift existing viewpoints". ***Id.*** at 345 (emphasis added).

The first-purpose-is-a-sham-conclusion is unwarranted. As noted, the panel misquoted the following portion of the disclaimer: "it is the basic right and privilege of each student to form his/her own opinion *or* [not "*and*", as the panel

opinion mistakenly quoted] maintain beliefs taught by parents on [the] . . . matter of the origin of life and matter". This mistaken reading of the disclaimer *as conjunctive, rather than disjunctive*, perhaps explains why the panel discounted the disclaimer's clear message that, concerning the origin of life and matter, students are free to *either* maintain their current beliefs, including those taught by their parents, *or* to form their own, new, independent opinions.

In any event, the panel held that, on balance, the disclaimer survives the secular purpose prong of ***Lemon v. Kurtzman***, 403 U.S. 602 (1971). ***Freiler***, 185 F.3d at 345. But, it concluded that it was unconstitutional nevertheless, on the basis that it violates ***Lemon***'s second prong (and the endorsement test of ***County of Allegheny v. American Civil Liberties Union***, 492 U.S. 573, 605 (1989)): its principal or primary effect impermissibly advances religion. ***Freiler***, 185 F.3d at 345-48.

As our court stated in ***Doe v. Duncanville Indep. Sch. Dist.***, 70 F.3d 402, 406 n.4 (5th Cir. 1995), "the Establishment Clause [does not] prevent [school district] employees from treating students' religious beliefs and practices with deference and respect; *indeed, the constitution requires this*". (Emphasis added.) Along this line, the ***Freiler*** panel "acknowledge[s] that local school boards need not turn a blind eye to the concerns of students and parents troubled by the teaching of evolution in public classrooms". ***Freiler***, 185 F.3d at 345-46. Obviously, those who might be so troubled might be those who believe in "the Biblical version of Creation".

Sadly, what the panel gives, it takes away. Notwithstanding the palaver about school boards *not* being required "to turn a blind eye to [such] concerns", the panel relied on "the interplay of three factors" in concluding that "the primary effect of the disclaimer is to protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation":

> (1) the juxtaposition of the disavowal of endorsement of evolution with an urging that students contemplate alternative theories of the origin of life; (2) the reminder that students have the right to maintain beliefs taught by their parents regarding the origin of life; and (3) the "Biblical version of Creation" as the only alternative theory explicitly referenced in the disclaimer.

Id. at 346.

1. *The juxtaposition of the disavowal of endorsement of evolution with an urging that students contemplate alternative theories of the origin of life.*

Considering the context in which the disclaimer is to be presented (at the start of a lesson presenting evolution as the *sole* explanation for the origin of life and matter), how can such "juxtaposition" impermissibly advance religion?

The theory of evolution may be viewed by some as anti-religious. The disclaimer recognizes this historic tension between evolution (scientific concept) and other theories or concepts about the origin of life and matter, using the

"Biblical version of Creation" as but *an example* of such other concepts. And, it affirmatively notes that evolution is the *only* theory taught. In furtherance of the purposes to disclaim any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum, and to reduce any resulting offense to students who adhere to concepts other than evolution, the disclaimer points out that the fact that evolution is the *only* such concept taught — "presented to inform students of [that] scientific concept" — is *not* intended to influence or dissuade any other concept, including the Biblical version. The disclaimer balances; it neutralizes; it is consistent with the requisite neutrality.

But, the panel construes the disclaimer's urging students to "exercise critical thinking" as being solely with respect to the Biblical theory, interpreting it as "encourag[ing] students to read and meditate upon religion in general and the 'Biblical version of Creation' in particular". ***Id.*** at 346. In so doing, the panel ignores the disclaimer's plain language (urging students to "closely examine *each* alternative", including evolution), as well as the context in which the disclaimer is presented, *i.e.*, preceding a lesson which presents evolution as the *sole* explanation for the origin of life and matter. Therefore, the panel misunderstands the message.

The curriculum provides students with information about *only one concept* (evolution). The disclaimer's mere mention of the existence of other concepts, *without presenting any information about the content of those concepts*, neither gives any preferred status to, nor advances, any other concept, which students must make an additional effort to consider or learn, *outside the classroom*.

2. *The reminder that students have the right to maintain beliefs taught by their parents regarding the origin of life.*

As discussed, the panel's reliance on this factor *may* have resulted from its misquoting the disclaimer (failing to recognize the disclaimer's use of "or" rather than "and" between the phrases "form his/her own opinion" and "maintain beliefs taught by parents"). As noted, we are now told that this error "does not affect the outcome of this case". In any event, how does reminding students of their right to maintain beliefs taught by their parents regarding the origin of life and matter, *or* to form their own beliefs about the subject, advance religion? In that students are taught about only one such concept — evolution — there is "no realistic danger that the community would think that the [School Board] was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental". ***Lamb's Chapel v. Center Moriches Union Free Sch. Dist.***, 508 U.S. 384, 395 (1993).

3. *The "Biblical version of Creation" as the only alternative theory specifically referenced in the disclaimer.*

The panel reasoned that, because the only alternative theory identified in the disclaimer is a religious one, the disclaimer "serves only to promote a religious alternative to evolution". ***Freiler***, 185 F.3d at 348. (As discussed, this may be the hook on which the panel hangs its disclaimer to the disclaimer, denial of rehearing hat.) The reliance on this factor is misplaced, because the panel fails to take into account the disclaimer's audience. Yet, the panel acknowledges that, "[i]n assessing the primary effect of the

contested disclaimer, we focus on the message conveyed by the disclaimer to the students who are its intended audience". ***Id.*** at 346.

The record reflects that an estimated 95% of the parish students are adherents to the Biblical concept of creation. Accordingly, use of the "Biblical version of Creation" as an illustration of an alternative concept to evolution is hardly surprising. Because the overwhelming majority of the students expected to hear the disclaimer were familiar with that alternative concept, the reference serves to *give context to the message, but without promoting that concept or expressing intolerance for any other*. Surely, giving context to a message is an admirable method of instruction.

Contrary to the panel's interpretation, the disclaimer expressly encourages examination of "each alternative" concept for life's origin, including evolution, the Biblical version, and others that are *not* identified. Moreover, the panel erroneously assumes that all alternatives to evolution are religious in nature, ignoring the existence of non-religious theories, such as the "Big Bang" and panspermia (reproductive bodies of living organisms exist throughout the universe and develop wherever the environment is favorable).

Based on my review of the record, the language of the disclaimer, and the context in which it was intended to be used, the primary effect of the disclaimer is *not* to advance religion; instead, it is to advance tolerance and respect for diverse viewpoints. The record reflects that, to the overwhelming majority of the parish students, the scientific

concept of evolution conflicts with their (or their parents') beliefs about the origin of life and matter; and its exclusive place in the curriculum had caused concern among students and parents. The disclaimer's message is one of respect for diverse viewpoints, informing students that teaching evolution as the sole concept for the origin of life and matter is *not* intended to influence or dissuade them from forming their own opinions about the subject *or* from maintaining beliefs taught by their parents.

In examining the disclaimer's effect, the panel erred by *not* considering the context in which the disclaimer was intended to be used. In the parish schools, evolution *is taught*; the "Biblical version of Creation" *is not*! How can the effect of the disclaimer be to endorse or advance a concept that is *merely mentioned*, using only four words, when evolution is the *only* concept for the origin of life and matter that is included in the curriculum, the only one that will be explained and discussed in any lesson following the disclaimer's being read?

Understood and considered in the context in which it is intended to be used, the disclaimer expresses tolerance for the views of all students. A student who adheres to the concept of evolution and does *not* adhere to the Biblical version of creation is taught evolution; told the curriculum is *not* meant to disparage other concepts, including the Biblical version; and encouraged to think critically. Likewise, a student who adheres to the Biblical version and believes it to conflict with the concept of evolution is taught evolution; told the curriculum is *not* meant to disparage other concepts; and encouraged to think critically.

Appendix A

As I noted in ***Murray v. City of Austin, Tex.***, 947 F.2d 147, 158 (5th Cir. 1991) (inclusion of Christian cross in city insignia held constitutional), *cert. denied*, 505 U.S. 1219 (1992), Justice Goldberg, in ***School Dist. of Abington Township, Pa. v. Schempp***, 374 U.S. 203 (1963), stated that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow". ***Id.*** at 308 (Goldberg, J., concurring). The disclaimer, as did the city insignia in ***Murray***, casts a "mere shadow" near, *instead of being a "threat" to*, the principles underlying the Establishment Clause. But, the panel has transformed neutrality into intolerance. Accordingly, I respectfully dissent from the denial of rehearing en banc.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED AUGUST 13, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30879 & No. 98-30132

HERB FREILER; SAM SMITH, Individually and in his capacity as Administrator of the Estate of his minor child Steven Smith; JOHN JONES,

Plaintiffs-Appellees,

v.

TANGIPAHOA PARISH BOARD OF EDUCATION; E.F. BAILEY; ROBERT CAVES; MAXINE DIXON; LEROY HART; RUTH WATSON, DONNIE WILLIAMS, SR.; ART ZIESKE, Individually and in their capacities as members of the School Board; TED CASON, Individually and in his capacity as Superintendent of Schools,

Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

Before KING, Chief Judge, and POLITZ and BENAVIDES, Circuit Judges.

Appendix B

BENAVIDES, Circuit Judge:

Parents of children in the Tangipahoa Parish Public Schools brought this suit to enjoin their school board from mandating that a disclaimer be read immediately before the teaching of evolution in all elementary and secondary classes. The district court held that the disclaimer constituted an establishment of religion in violation of the First Amendment. We affirm.

I.

The teaching of evolution has created controversy for many years in the Tangipahoa Parish Public Schools ("TPPS"). Following a failed attempt to introduce creation science into the Tangipahoa curriculum as a legitimate scientific alternative to evolution, the Tangipahoa Parish Board of Education ("School Board" or "Board") adopted a resolution disclaiming the endorsement of evolution.[1] The resolution, which passed by a 5-4 vote of the School Board on April 19, 1994, reads:

---

[1] The passage of the disclaimer was not the first action by the School Board concerning the teaching of evolution. In December 1993, a member of the School Board proposed a *Policy on the Inclusion of Religious Material and Discussions on Religion in the Curriculum and in Student Activities* ("Policy"). That same member later proposed a *Revised Draft of Policy* ("Revised Policy"). These policies would have allowed the teaching of alternative theories of the origin of mankind, including Creation science. Even though it was defeated in Committee, the Revised Policy was discussed at a March 1994 School Board meeting. During that meeting, the Board rejected two items in the Revised Policy concerning the study of creation science and a graduation ceremony prayer.

(Cont'd)

Appendix B

Whenever, in classes of elementary or high school, the scientific theory of evolution is to be presented, whether from textbook, workbook, pamphlet, other written material, or oral presentation, the following statement shall be quoted immediately before the unit of study begins as a disclaimer from endorsement of such theory.

It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.

It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion and maintain beliefs taught by parents on this very important

---

(Cont'd)

The Board passed four other items included in the Revised Policy. Those items provided that (1) no religious belief or non-belief should be promoted or disparaged by the school system; (2) religious materials may be included in secular education (e.g., literature, art, humanities, etc.); (3) artistic expressions (e.g., music, art, etc.) could have religious themes if they were presented objectively; and (4) students could distribute religiously oriented materials as long as students followed the school's rules pertaining to content-neutral time, place, and manner restrictions.

> matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.

Preceding the adoption of the resolution, School Board members and parents who were present at the April 19, 1994, meeting discussed the language of the disclaimer. In particular, debate centered on the inclusion of the phrase "Biblical version of Creation." A School Board member, Logan Guess, voiced concerns that the reference to the Bible excluded non-Christian viewpoints from the disclaimer. He argued that, even though the disclaimer also included the phrase "or any other concept," School Board members were concerned only with declining to endorse evolution because of its inconsistency with the Biblical version of creation. Bailey, the board member who proposed the disclaimer, justified including the phrase, arguing that because "there are two basic concepts out there" (presumably creation science and evolution), and because he believed that "perhaps 95 percent" of the community "fall into the category of believing [in] divine creation," the Board should not "shy away, or hide away from saying that this is not to dissuade from the Biblical version." In his closing remarks immediately before the Board voted to adopt the disclaimer, Bailey further suggested that evolution theory as taught in science class should not be confused with fact and that the School Board should explicitly decline to endorse evolution theory because of its inconsistency with the faith of the larger community.

On November 7, 1994, approximately seven months after the resolution passed, several parents of children in the TPPS brought suit in the U.S. District Court for the Eastern District of Louisiana, challenging the validity of the disclaimer under provisions in the United States and Louisiana constitutions barring laws "respecting an establishment of religion."[2] U.S. Const. amends., I, XIV; La. Const. art. I, sec. 8. The district court concluded that the resolution was devoid of secular purpose and therefore ran afoul of the first prong of the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In reaching this conclusion, the district court discredited the School Board's assertion that its secular purpose in adopting the disclaimer was to promote critical thinking and information gathering by students on the subject of the origin of life. The court noted that School Board members did not mention this purported purpose during the adoption debate and that the Tangipahoa Parish Public Schools already encouraged students to think critically about all issues before the adoption of the disclaimer. The district court found that the statements made by School Board members both during the adoption debate and while testifying at trial revealed that the disclaimer, in fact, had a religious purpose — i.e., to satisfy the religious concerns of the majority that the teaching of evolution in public school contradicted lessons taught in Sunday school. Accordingly,

---

[2] The First Amendment of the United States Constitution in relevant part provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." This prohibition is applicable to the states through the Fourteenth Amendment. *See Stone v. Graham*, 449 U.S. 39, 41 n. 2, 101 S. Ct. 192, 193 n. 2 (1980); *School District of Abington v. Schempp*, 374 U.S. 203, 215-16, 83 S. Ct. 1560, 1567-68 (1963).

the court held the resolution invalid under the federal and state constitutions and enjoined the reading of the disclaimer. The School Board and the named individual defendants then brought this appeal.

II

The sole issue for our resolution is whether the specific disclaimer adopted by the Tangipahoa Parish Board of Education contravenes the First Amendment. We limit our analysis to the precise language of the disclaimer and the context in which it was adopted. We do not confront the broader issue of whether the reading of any disclaimer before the teaching of evolution would amount to an unconstitutional establishment of religion.

States and their duly authorized boards of education have the right to prescribe the academic curricula of their public school systems. Courts therefore must exercise great "care and restraint" when called upon to intervene in the operation of public schools. *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S. Ct. 266, 270 (1968). Given, however, that the "vigilant protection of constitutional freedoms" is nowhere more vital than in American public education, *id.*, 89 S. Ct. at 270, the right to prescribe public school curriculum must of necessity be limited in scope. States may not require that teaching and learning be tailored to the principles or prohibitions of any religious sect or dogma. *See id.* at 106, 89 S. Ct. at 271.

In the context of public education, we have evaluated state action challenged on Establishment Clause grounds under each of "three complementary (and occasionally

overlapping) tests" established by the Supreme Court. *Doe v. Santa Fe Independent School District*, 168 F.3d 806, 816 (5th Cir. 1999). The first test, and the one of longest lineage, is the disjunctive three-part *Lemon* test, under which a state practice is unconstitutional if (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion. *See Lemon*, 403 U.S. at 612-613, 91 S. Ct. at 2111. The second test, commonly referred to as the endorsement test, seeks to determine whether the government endorses religion by means of the challenged action. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 594, 109 S. Ct. 3086, 3101 (1989) (holding that the display of a creche on the Grand Staircase of the Allegheny County Courthouse violated the First Amendment but that the display of a menorah as part of a secular exhibit was constitutional). The government unconstitutionally endorses religion when it "conveys a message that religion is 'favored,' 'preferred,' or 'promoted' over other beliefs." *Id.* at 593, 109 S. Ct. 3086. Finally, the third test, aptly named the coercion test, analyzes school-sponsored religious activity in terms of the coercive effect that the activity has on students. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992) (holding unconstitutional a school district's policy permitting school principals to invite clergy to give "nonsectarian" invocations and benedictions at graduation ceremonies). Under this test, school-sponsored activity contravenes the First Amendment when "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors." *Jones v. Clear Creek Independent School District*, 977 F.2d 963, 970 (5th Cir. 1992) ("*Clear Creek II*") (citation omitted).

Our multi-test analysis in past cases has resulted from an Establishment Clause jurisprudence rife with confusion and from our own desire to be both complete and judicious in our decision-making. *See, e.g., Doe ex rel. Doe v. Beaumont Independent School District*, 173 F.3d 274, 295 (5th Cir.) (analyzing school district's "Clergy in Schools" volunteer counseling program utilizing *Lemon*, endorsement, and coercion tests), *reh'g en banc granted*, __ F.3d __ (1999); *Ingebretsen v. Jackson Public School District*, 88 F.3d 274, 280 (5th Cir. 1996) (examining state statute permitting public school students to initiate nonsectarian, nonproselytizing prayer at compulsory and noncompulsory school events pursuant to the *Lemon*, endorsement, and coercion tests); *Clear Creek II*, 977 F.2d 963, 966-969, 972 (employing *Lemon*, endorsement, and coercion analysis to uphold a school district resolution permitting public high school seniors to choose student volunteers to deliver nonsectarian, nonproselytizing invocations at graduation ceremonies). Nothing in our Circuit's case law requires that contested government action be examined under each Supreme Court-delineated test. *Cf. Santa Fe Independent School District*, 168 F.3d at 818 (explaining that, because student-selected, student-given, sectarian, proselytizing invocations and benedictions violate the *Lemon* test and the endorsement test, analysis under the coercion test was not necessary); *Helms v. Picard*, 151 F.3d 347, 362 (5th Cir. 1998) (analyzing a school aid program in accordance with only the *Lemon* test), *cert. granted sub nom., Mitchell v. Helms*, No. 98-1648, 1999 WL 231469 (U.S. Jun. 14, 1999). The decision to apply a particular Establishment Clause test rests upon the nature of the Establishment Clause violation asserted. Where, as in the instant action, the practice at issue

does not direct student participation in a formal religious exercise, we elect not to apply the coercion test.

III

Although widely criticized and occasionally ignored, the *Lemon* test continues to govern Establishment Clause cases. In *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1310 (1997), the Supreme Court laid to rest rumors of the *Lemon* test's demise when it exclusively applied *Lemon* analysis to a school aid program. The Court acknowledged the continued viability of the general *Lemon* principles used to evaluate whether government action violates the Establishment Clause and noted in particular that the nature of the inquiry under *Lemon*'s purpose prong has "remained largely unchanged." *Id.* at 223, 117 S. Ct. at 2010.

A.

The first prong of the *Lemon* test requires that challenged state action have a secular purpose. *See Lemon*, 403 U.S. at 612, 91 S. Ct. at 2111. *Lemon*'s first prong does not require that challenged state action have been enacted in furtherance of exclusively, or even predominately, secular objectives. *See Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985) (explaining that a statute motivated in part by a religious purpose may satisfy *Lemon*'s purpose prong). In order for state activity to pass muster under *Lemon*'s first criterion a sincere secular purpose for the contested state action must exist; even if that secular purpose is but one in a sea of religious purposes. *See id.* at 56, 105 S. Ct. at 2489.

Appendix B

The School Board has articulated three distinct, albeit intertwined, purposes for the contested disclaimer. According to the Board, the disclaimer serves (1) to encourage informed freedom of belief, (2) to disclaim any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum, and (3) to reduce offense to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution.

We treat the School Board's three-fold articulation of purpose with deference. *See Santa Fe Independent School District*, 168 F.3d at 816. Deference, however, ought not be confused with blind reliance. Accordingly, we examine each of the disclaimer's avowed purposes to ensure that the purpose is sincere and not a sham. *See id.* (citing *Edwards v. Aguillard*, 482 U.S. 578, 586-87, 107 S. Ct. 2573, 2579 (1987)). In undertaking such a "sham" inquiry, we consider whether the disclaimer furthers the particular purposes articulated by the School Board or whether the disclaimer contravenes those avowed purposes. *See Aguillard*, 482 U.S. at 589, 107 S. Ct. at 2580 (finding purported purpose of protecting academic freedom to be insincere in light of the fact that "the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting evolution"). If the disclaimer furthers just one of its proffered purposes and if that same purpose proves to be secular, then the disclaimer survives scrutiny under *Lemon*'s first prong.

We find that the contested disclaimer does not further the first articulated objective of encouraging informed freedom of belief or critical thinking by students. Even though the final sentence of the disclaimer urges students

Appendix B

"to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion," we find that the disclaimer as a whole furthers a contrary purpose, namely the protection and maintenance of a particular religious viewpoint. In the first paragraph to be read to school children, the Tangipahoa Board of Education declares that the "Scientific Theory of Evolution . . . should be presented to inform students of the scientific concept" but that such teaching is "not intended to influence or dissuade the Biblical version of Creation or any other concept." From this, school children hear that evolution as taught in the classroom need not affect what they already know. Such a message is contrary to an intent to encourage critical thinking, which requires that students approach new concepts with an open mind and a willingness to alter and shift existing viewpoints. This conclusion is even more inescapable when the message of the first paragraph is coupled with the statement in the last that it is "the basic right and privilege of each student to . . . maintain beliefs taught by parents on [the] . . . matter of the origin of life . . . ." We, therefore, find that the disclaimer as a whole does not serve to encourage critical thinking and that the School Board's first articulated purpose is a sham.

We find that the disclaimer does further the second and third purposes articulated by the School Board. The disclaimer explicitly acknowledges the existence of at least one alternative theory for the origin of life, i.e., the Biblical version of creation. Additionally, the disclaimer reminds school children that they can rightly maintain beliefs taught by their parents on the subject of the origin of life. We have no doubt that the disclaimer will further its second and third

avowed objectives of disclaiming any orthodoxy of belief that could be implied from the exclusive place of evolution in the public school curriculum and reducing student/parent offense caused by the teaching of evolution. Accordingly, we conclude that these two purposes are sincere.

We next consider whether disclaiming orthodoxy of belief and reducing student/parent offense are permissible secular objectives. In conducting this inquiry, we are mindful that a purpose is no less secular simply because it is infused with a religious element. *Cf. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335, 107 S. Ct. 2862, 2868 (1987) (explaining that the *Lemon* test, requiring that the law at issue serve some secular legislative purpose, does not require that the contested law's purpose be unrelated to religion); *Lynch v. Donnelly*, 465 U.S. 668, 673, 104 S. Ct. 1355, 1359 (1984) (noting that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions . . . . Anything less would require the 'callous indifference' we have said was never intended"). For this reason, the fact that evolution, the subject about which the School Board sought to disclaim any orthodoxy of belief, is religiously charged, *see Aguillard*, 482 U.S. at 593, 107 S. Ct. at 2582 (noting that evolution is the one scientific theory that historically has been opposed by certain religious sects), and the fact that the sensitivities and sensibilities to which the School Board sought to reduce offense are religious in nature, does not per se establish that those avowed purposes are religious purposes.

In order to avoid the "callous indifference" first cautioned against by the Supreme Court in *Zorach v. Clauson*, 343 U.S. 306, 314, 702 S. Ct. 679, 684 (1952), we conclude that, under the instant facts, the dual objectives of disclaiming orthodoxy of belief and reducing student/parent offense are permissible secular objectives that the School Board could rightly address. *Cf. Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681, 106 S. Ct. 3159, 3163 (1986) (noting that, in the context of a civil rights action, fundamental values essential to a democratic society include "tolerance of divergent political and religious views" and "consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students"). In so doing, we acknowledge that local school boards need not turn a blind eye to the concerns of students and parents troubled by the teaching of evolution in public classrooms.

B.

Lemon's second prong asks whether, irrespective of the School Board's actual purpose, "the practice under review in fact conveys a message of endorsement or disapproval." *Doe v. Santa Fe Independent School District*, 168 F.3d 806, 817 (5th Cir. 1999). This is similar to analysis pursuant to the endorsement test. Under either the second *Lemon* prong or the endorsement test, the Supreme Court has cautioned that a government practice may not aid one religion, aid all religions, or favor one religion over another. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 605, 109 S. Ct. 3086, 3107 (1989) ("Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion), it certainly means at the

very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)." (citation omitted)). Nonetheless, where the benefit to religion or to a church is no more than indirect, remote, or incidental, the Supreme Court has advised that "no realistic danger [exists] that the community would think that the [contested government practice] was endorsing religion or any particular creed." *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 395, 113 S. Ct. 2141, 2148 (1993).

Against this jurisprudential backdrop, the School Board argues that the contested disclaimer's primary effect is "to communicate to students that they are free to form their own opinions or maintain beliefs taught by parents concerning the origin of life and matter." According to the School Board, the disclaimer advances freedom of thought, as well as sensitivity to, and tolerance for, diverse beliefs in a pluralistic society. We disagree.

In assessing the primary effect of the contested disclaimer, we focus on the message conveyed by the disclaimer to the students who are its intended audience. *See County of Allegheny*, 492 U.S. at 620, 109 S. Ct. at 3115. After careful consideration of the oral arguments, the briefs, the record on appeal, and the language of the disclaimer, we conclude that the primary effect of the disclaimer is to protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation. In reaching this conclusion, we rely on the interplay of three factors: (1) the juxtaposition of the disavowal of endorsement of evolution with an urging that students contemplate alternative theories

of the origin of life; (2) the reminder that students have the right to maintain beliefs taught by their parents regarding the origin of life; and (3) the "Biblical version of Creation" as the only alternative theory explicitly referenced in the disclaimer.

We note that the term "disclaimer," as used by the School Board to describe the passage to be read to students before lessons on evolution, is not wholly accurate. Beyond merely "disclaiming" endorsement of evolution, the two paragraph passage urges students to take action — to "exercise critical thinking and gather all information possible and closely examine each alternative" to evolution.[3] The disclaimer, taken as a whole, encourages students to read and meditate upon religion in general and the "Biblical version of Creation" in particular.[4]

---

[3] In passing on the constitutionality of the contested disclaimer, we consider the disclaimer as a whole. Accordingly, we do not express an opinion as to whether the first paragraph standing alone impermissibly advances religion.

[4] The School Board asserts that the reference to the "Biblical version of Creation" is merely illustrative, affording meaning to the phrase "other concepts." The School Board's use of a religious concept as the only illustration of an "other concept[ ]," however, supports our conclusion that the disclaimer impermissibly advances religion. *Cf. Ingebretsen v. Jackson Public School District*, 88 F.3d 274, 279 (5th Cir. 1996) (explaining that a government measure advances religion when it "gives a preferential, exceptional benefit to religion [or a particular form of religion] that it does not extend to anything else"). We also note that the record does not comport with the School Board's characterization of its reason for including

(Cont'd)

Although it is not per se unconstitutional to introduce religion or religious concepts during school hours, there is a fundamental difference between introducing religion and religious concepts in "an appropriate study of history, civilization, ethics, comparative religion, or the like" and the reading of the School Board-mandated disclaimer now before us. *Stone v. Graham*, 449 U.S. 39, 42, 101 S. Ct. 192, 194 (1980). The TPPS disclaimer[5] does not encourage students to think about religion in order to provide context for a political controversy studied in a history class, *see, e.g., Aguillard*, 482 U.S. at 607 n.8, 107 S. Ct. at 2590 n.8 (Powell, J., concurring) ("For example, the political controversies in Northern Ireland, the Middle East, and India cannot be understood properly without reference to the underlying religious beliefs and the conflicts they tend to generate."), or to promote understanding of different religions, *see, e.g., School District of Abington v. Schempp*, 374 U.S. 203, 225, 83 S. Ct. 1560, 1573 (1963) ("[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and

---

(Cont'd)
"Biblical version of Creation" in the disclaimer. When the School Board debated the propriety of the proposed disclaimer, a member suggested deleting the reference to the Biblical version of creation. The Board ultimately rejected that suggestion, apparently not because doing so might confuse students who needed an illustrative reference, but because doing so would, in the words of the disclaimer's sponsor, "gut . . . the basic message of the [disclaimer]."

[5] Despite our conclusion that the statement to be read student does more than "disclaim" evolution, we will continue to refer to the entire statement as a disclaimer for purposes of convenience.

its relationship to the advancement of civilization."). Instead, the disclaimer — including the directive to "exercise critical thinking" in the second paragraph, together with the explicit reference to the "Biblical version of Creation" in the first paragraph — urges students to think about religious theories of "the origin of life and matter" as an *alternative* to evolution, the State-mandated curriculum.

The School Board cites two cases, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S. Ct. 2141 (1993), and *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981), in defense of its position that any benefit to religion conferred by the disclaimer is merely incidental and that, as such, the disclaimer does not impermissibly advance religion. These cases, in which the Supreme Court found that government action did not violate the Establishment Clause, are distinguishable.

In *Widmar*, members of a registered religious group at a state university brought an action challenging a university policy which excluded religious groups from being able to utilize university facilities that were generally available for activities of registered student groups. *See Widmar*, 454 U.S. at 266, 102 S. Ct. at 273. The Court found that the challenged policy violated the First Amendment. *See id.* at 277, 102 S. Ct. at 278. In reaching this conclusion, the *Widmar* Court explained that a "religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion." *See id.* at 273, 102 S. Ct. at 276. The Court relied on two factors. *See id.* at 274, 102 S. Ct. at 276. First, the Court found that, in allowing a registered student religious organization to use

an otherwise open forum, a public university "does not confer any imprimatur of state approval on religious sects or practices." *Id.*, 102 S. Ct. at 276. Second, the court found that use of the university facilities is available to a broad class of speakers, including nonreligious speakers. *See id.*, 102 S. Ct. at 277.

Unlike in *Widmar*, the particular benefit to religion at issue here is not merely incidental. A teacher's reading of a disclaimer that not only disavows endorsement of educational materials but also juxtaposes that disavowal with an urging to contemplate alternative religious concepts implies School Board approval of religious principles. Moreover, unlike the public forum at issue in *Widmar*, the disclaimer crafted by the School Board serves only to promote a religious alternative to evolution. We know this because the only alternative theory explicitly referenced in the text of the disclaimer is a religious one. Therefore, *Widmar* does not support the Board's argument.

The School Board's reliance on *Lamb's Chapel* is misplaced as well. In that case, the Court held that using a public school after school hours for the showing of religiously oriented films did not violate the Establishment Clause. *See Lamb's Chapel*, 508 U.S. at 395, 113 S. Ct. at 2148. The Court found that "this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members." *Id.*, 113 S. Ct. at 2148. The Court concluded that, under these circumstances, there was no realistic danger that the community would think that the school district was endorsing religion.

There are few, if any, parallels between the instant case and *Lamb's Chapel*. Here, the disclaimer approved by the School Board is to be read during school hours by school teachers and explicitly encourages students to consider religious alternatives to evolution, a part of the state-mandated curriculum. Unlike in *Lamb's Chapel*, there is a much greater danger of students and parents perceiving that the School Board endorses religion, specifically those creeds that teach the Biblical version of creation.

The benefit to religion conferred by the reading of the Tangipahoa disclaimer is more than indirect, remote, or incidental. As such, we conclude that the disclaimer impermissibly advances religion, thereby violating the second prong of the *Lemon* test as well as the endorsement test.

IV

The School Board additionally disputes the district court's award of attorneys' fees to Appellee Freiler. We review a district court's award of attorneys' fees for abuse of discretion, and its factual findings relating to the award of attorneys' fees for clear error. *See Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993). Where a decision awarding attorneys' fees is adequately supported by the record and the district court has explained its reasons for the award, there is no abuse of discretion. *See Strong v. Bellsouth Telecommunications, Inc.*, 137 F.3d 844, 851 (5th Cir. 1998).

The district court found that Freiler was a prevailing party and awarded Freiler attorneys' fees pursuant to

42 U.S.C. § 1988. The court used the lodestar method of determining the appropriate award, first multiplying an hourly rate by hours expended, and then adjusting the award according to the factors outlined in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (1974).

The district court found that Freiler's counsel kept contemporaneous time records, and that they were therefore not reconstructed. The court found that the records contained sufficient detail to determine the time expended in pursuing Freiler's claim. The district court also reduced the number of hours that Freiler's counsel billed by ten percent to reflect "possible redundancy and work which in hindsight may have been unnecessary." Lastly, the district court applied an hourly rate of $150,[6] based explicitly on application of the *Johnson* factors. The court multiplied the $150 rate by the adjusted billable hours, and awarded $49,444.50 to Freiler's counsel.

We affirm the district court's award of attorneys' fees. First, the billing records are sufficiently detailed under our analysis in *League of United Latin American Citizens #4554 v. Roscoe Independent School District*, 119 F.3d 1228, 1233 (5th Cir. 1997). In that case, we found that billing records were adequate where the records showed the date, the number of hours spent, and a "short but thorough description of the services rendered." *Id.* Second, even if Freiler's counsel failed to contemporaneously produce billing records, as the School Board argued, such a failure "does not preclude an

[6] Freiler's counsel had petitioned the court to award fees based on an hourly rate of $175 an hour. The court agreed that the $175 rate was "arguably" reasonable, but decided that a $150 rate was more appropriate based on *Johnson*.

award of fees per se, as long as the evidence produced is adequate to determine reasonable hours." *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 325 (5th Cir. 1995). Third, the district court did not commit clear error in finding the $150 rate to be reasonable, given the declarations that it reviewed from three New Orleans attorneys regarding prevailing rates. Fourth, the district court did not commit clear error when, instead of addressing the necessity and potential redundancy of each billed hour, it reduced the overall number of hours by ten percent. Indeed, *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 325 (5th Cir. 1995), the only case cited by the School Board in support of its argument that a district court must analyze each billing item, is distinguishable. In *Kellstrom*, the issue was whether the billing records were sufficiently detailed, not whether the district court judge had discretion to reduce the amount of hours billed by a percentage. *See id.* at 325.

VI.

For the foregoing reasons, we affirm the district court's ruling that the disclaimer violates the First Amendment and the district court's award of attorneys' fees to Appellee Freiler.

AFFIRMED.

APPENDIX C — FINDINGS AND CONCLUSIONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED AND FILED AUGUST 8, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 94-3577

SECTION: E/5

HERB FREILER, SAM SMITH, and JOHN JONES,

versus

TANGIPAHOA PARISH BOARD OF EDUCATION, E.F. BAILEY, ROBERT CAVES, MAXINE DIXON, LEROY HART, RUTH WATSON, DONNIE WILLIAMS, SR., ART ZIESKE, and TED CASON

FINDINGS AND CONCLUSIONS

This is an action challenging the constitutionality of a resolution mandating that a disclaimer of endorsement of the scientific theory of evolution be read by all teachers in Tangipahoa Parish public schools to their students prior to presenting the subject matter of this material in class. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, as it arises under the Constitution of the United States. The following findings of fact and conclusions of law are rendered on the basis of the record, the evidence presented by the parties in their stipulation of

facts and submission of exhibits, their memoranda of law, proposed findings and conclusions and reply briefs, and the law.

I.

Plaintiff Herb Freiler is the father of the minor child Sydney Michelle Freiler, who attends a Tangipahoa Parish public school. Both Herb and Sydney Freiler reside in Tangipahoa Parish within the jurisdiction of the Tangipahoa Parish School Board ("the School Board")

Plaintiff Sam Smith (pseudonym) is the father of two children, who attend Tangipahoa Parish public schools. All three reside within the jurisdiction of the Tangipahoa Parish School Board.

Plaintiff John Jones (pseudonym) is the father of a child who attends a Tangipahoa Parish public school. They reside in the jurisdiction of the Tangipahoa Parish School Board.

Defendant Tangipahoa Parish Board of Education is a political subdivision of the State of Louisiana, organized pursuant to LSA-R.S. 17:51 *et seq*, for the purpose of providing public education to the schoolchildren residing within Tangipahoa Parish.

Defendants E. F. Bailey, Robert Caves, Maxine Dixon, Leroy Hart, Ruth Watson, Donnie Williams, Sr., and Art Zieske, at all pertinent times elected members of the School Board and residents of Tangipahoa, were sued exclusively in their official capacities as members of the School Board.

Appendix C

Defendant Ted Cason was the Superintendent of Tangipahoa Parish Schools and was employed by the School Board. He was responsible for implementing the School Board's policies until his retirement in 1995 and is sued exclusively in his official capacity as former Superintendent of Schools.

On April 19, 1994, the School Board adopted the following resolution, which shall be referred to as "the disclaimer":

> Whenever, in classes of elementary or high school, the scientific theory of evolution is to be presented, whether from textbook, workbook, pamphlet, other written material, or oral presentation, the following statement shall be quoted immediately before the unit of study begins as a disclaimer from endorsement of such theory.
>
> It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.
>
> It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion or maintain beliefs taught by parents on this very important

Appendix C

> matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.

The resolution was proposed by School Board member E. F. Bailey. School Board members E. F. Bailey, Robert Caves, Leroy Hart, Ruth Watson and Art Zieske voted in favor of the resolution and School Board members Logan Guess, C. Howard Nichols, Maxine Dixon and Donnie Williams voted against the resolution. Thus, the resolution was passed by a vote of 5 to 4.

Prior to the time this resolution was introduced, the Education/Curriculum Committee of the School Board considered adopting an official written document entitled *Policy on the Inclusion of Religious Materials and Discussions on Religion in the Curriculum and in Student Activities* and a *Revised Draft of Policy*. These documents were presented by Art Zieske, School Board member, for consideration by the Committee. These documents do not mandate the teaching of alternative theories to the origin of mankind, but do allow the teaching of Creation Science. Creation Science, as the term shall be used herein, is the theory that the universe, including all forms of life, was created literally in the manner described in the Bible by a higher Being, or, as alternately described, the theory of intelligent design or creation by a Divine Creator.

During the initial introduction of the proposed policy at a Committee meeting held on December 15, 1993, several members of the public expressed opinions concerning the

proposed policy. The minutes of the meeting reflect that most, if not all, of the persons speaking at the meeting understood that the policy would allow the teaching of Creation Science, and most, if not all, of the opinions related at the meeting were either in support of or against the teaching of Creation Science. No other portion of the proposed policy, such as the Graduation ceremony prayer policy or the distribution of religiously oriented materials in the public schools, was discussed in any detail. The topic of Creation Science dominated the discussion.

The *Revised Draft of Policy* (Joint Exhibit 6) was on the School Board's March 1, 1994 agenda. After discussion, items 3 and 6 in the *Revised Draft of Policy*, which concerned the study of Creation Science and the Graduation Ceremony Prayer Policy, were not approved. Items 1, 2, 4, and 5, which provided that no religious belief or non-belief be promoted or disparaged by the School System, that religious materials may be included in the secular programs teaching literature, art, humanities, ethics and history, and that artistic expressions, such as music, drama, and art, may have religious themes if they are presented objectively "as a traditional part of the cultural and religious heritage of the particular holiday" were approved. The adopted policy also preserved the right of students to distribute "religiously oriented materials such as holiday greeting cards and newspapers so long as the school's rules pertaining to content-neutral time, place and manner restrictions to prevent disruption of the educational process [were] followed."

Board member E. F. Bailey introduced the endorsement disclaimer at issue herein at the April 19, 1994 School Board

meeting. Instead of initially attempting to obtain the approval of the policy committee, Bailey introduced the matter to the entire School Board. An extended discussion took place between several of the Board members, Chris Moody, who is legal counsel for the Board, and Freiler, a plaintiff, concerning the disclaimer proposal.

Logan Guess, one of the School Board members who voted against the disclaimer, raised concerns about the inclusion of the phrase "Biblical version of creation", stating:

> The second paragraph, the way it states 'not intended to influence or dissuade the Biblical version of creation or any other concept,' the question I have is, if — if you want to endorse or suggest that students form their own opinions, my question about the Biblical version of creation, what about maybe non-Christian students, students who don't necessarily conform or believe in the Biblical version? My only question is, what about people of other faiths, other than the Christian faith, who believe in other versions of the origin of man, whether it be creation, evolution, whatever they may believe in. . . .
>
> Let me go on to — to conclude that. My concern is if we include the statement about the Biblical version of creation, it seems to me that that will open us up to — to questions from people of other beliefs who would criticize and take issue with the fact that we're singling out the Biblical version of creation. Even though there are many,

> many other versions of creation besides the one that maybe the people in this room adhere to, being the Holy Bible, which I individually and personally believe, but there are many other people that may not believe in that particular version of creation.

Transcript of Tangipahoa Parish Board of Education meeting, April 19, 1994, pp. 5-6 (Joint Exhibit 2).

Board member Guess later explained his objection to the inclusion of the phrase "Biblical version of creation," in this manner:

> Can I give you an example of the problem that I have? Is everybody says [sic] 'the Biblical version of creation or any other concept.' Well, we mentioned 'any other concept,' but we mentioned specifically the Biblical version of creation. What if we substituted the Biblical version for the Hindu version of creation or any other concept, or the American Indian version of creation or any other concept? Would anybody in this room vote to do that? I don't think so. That's my point.

Transcript of School Board meeting, April 19, 1994, pp. 23-24 (Joint Exhibit 2).

In explaining why he rejected the suggestion that the phrase "the Biblical version of creation" be deleted, Board member Bailey, who introduced the proposal, explained:

> Why — why would we — I — I — I couldn't accept that and I think you deserve to hear why. I think by that, you've gutted the basic message of this document. And I appreciate where you're coming from. I don't apologize for that position.

Transcript of School Board meeting, April 19, 1994, p. 13 (Joint Exhibit 2).

In further answering Guess' questions about the disclaimer, Bailey responded:

> Mr. Chairman, let me answer this. Mr. Guess is speaking as an individual on that. Let's just face facts. We can talk about Hindu, we can talk about Mohammed, we can talk about all this other stuff, but there are two basic concepts out there and usually you call them — in fact, you would be hard pressed probably to find many that you would call on one or the others. Now, I happen to feel that a large, large percentage, perhaps 95 percent, fall into the category of believing in divine creation. But the whole point is that those are the two main concepts and I don't think we need shy away, or hide away from saying that this is not to dissuade from the Biblical version. . . . You know, I want to preempt my closing remarks, Mr. Chairman, but I'm just telling you that that needs to be put in that particular part of this document and clearly stated so that it will be clearly understood by any and all as to exactly what we mean to say. And that — that's all we're

> trying to do there. And — And to be out front, the Board way what we're trying to say; we're criticized so often with being abstract and these sorts of things. You know, say what you want to say. And that's what his document does.

Transcript of School Board meeting, April 19, 1994, pp. 25-26 (Joint Exhibit 2).

In his closing remarks, immediately prior to the vote on the policy statement, Bailey summarized the reasons he offered the proposal:

> Let me — Let me say this. Hopefully this can maybe put this thing in perspective. But if it were a government class, a history class at school, and the teacher got up and was going to talk about various forms of government . . . and he or she talked about the dictatorial form of government and didn't mention democracy, and then went on to another subject, wouldn't people stop and say "Hey, wait, didn't you forget democracy? Don't we live in a democracy? You forgot about that. Hey, wait, don't go any further." And — And isn't that — Is that what we're doing now? Isn't it so that a large percentage, something in the 90 percent of our youngsters, are taught, from infancy on up, that — that God created all life and matter? And we — And those kids were sent to school, they get in that classroom at that young age of, what, third, fourth grade or whatever, here comes their first science textbook, here comes

> their first science class, and here comes this same thing of the analogy of government; somebody comes and tells them that they are a mere accident, that — that they're a product . . . of the Big Bang theory and that that's why they are here, and the kid is thinking and saying, "Wait a minute. This doesn't coincide with what my parents taught me. This is not what I learned in Sunday school." . . .
>
> Folks, I'm just telling you that I can't go on being any — any part of that and — I'm going to give it my best effort and now you have your opportunity to change things. We're not here tonight to ask you to adopt creationism. We were here a month ago or two months ago asking that, and — and we understand that and — but we are simply asking this as a very reasonable compromise, for this disclaimer, to put this thing in perspective.
>
> We — We — We would like that it not be taught as fact. That youngster, when that material is presented to him, and he reads it out of a textbook, it is — it is thought to be fact when there is nothing disclaiming it, or there is not another lesson given to explain other concepts. What else can he do except take it for fact? I did. . . .
>
> I feel this is very reasonable and it — it's terribly important. It's — It's important because there is so much riding on a youngster's concept

> of the origin . . . of life and matter. If it was an accident, life is not important, because, you see, it's just an accident. Human lives are not important, that means that this thing of abortion is — gives more validity to that, because life is not important, and — and the fact that the crime record — crime rate is sweeping our nation, sweeping our state, you see, it gives credibility there because life is not important because we are just here by accident. . . . I just want to tell you how important, how eternally important this vote is. So when this roll call vote is made, I just urge you to support what I feel is a very reasonable compromise.

Transcript of School Board meeting, April 19, 1994, pp. 29-33 (Joint Exhibit 2).

At the April 19, 1994 meeting, no member of the School Board listed any non-religious theory for the origin of life and matter, except for a casual mention of the "Big Bang" theory. All of the "other concepts" which the School Board members intended "not to influence or dissuade" were religious, including the Biblical version of Creation, which was listed in the disclaimer, as well as others which were not specifically listed, such as the Hindu version, Islamic version, or the American Indian version.

In the trial testimony, Board member Bailey stated that the reason he proposed the disclaimer was due to the discontent of his constituents with the teaching of evolution as fact. Bailey testified that his constituents do not share the

belief in evolution, that they believe the Biblical version of creation, and that they "resent their children being confused with the presentation of the theory of evolution."

During the discussion of the proposed resolution, no Board member stated that the reason the disclaimer was being introduced was to urge students to exercise their critical thinking skills or to examine all alternatives when forming opinions, purposes later embraced by Board members in depositions or in trial testimony. The discussions at the proposed meeting centered on the strong belief by certain Board members that schoolchildren should not be taught evolution as fact, that they would be confused by the teaching of evolution in public school because most of the children are taught the Biblical theory of creation or creation by a Higher Being in Sunday School.

The students in Tangipahoa Parish Public Schools are encouraged to exercise critical thinking skills in all classes, including science classes. Even before the adoption of the disclaimer resolution, students being taught evolution in science classes had the right to discuss any alternative theories other than evolution in class, and teachers were free to mention concepts concerning the origin of life and matter other than evolution and encourage students to consider them. Despite this, the teaching of evolution has created controversy for many years in Tangipahoa Parish Public Schools, as well as in other schools and communities.

The School Board mandates no disclaimer prior to the teaching of any other subjects or theories in Tangipahoa Parish Public Schools. It does require that parents sign

consent forms prior to the teaching of sex education and before their child viewed an edited version of the movie *Schindler's List*.

To date of trial, implementation of the disclaimer has not been enforced by the School Board.

II.

The challenge to the disclaimer mounted by the plaintiffs arises out of the First Amendment to the United States Constitution, which proclaims simply that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" and out of Article 1, § 8 of the Louisiana Constitution, which states that "No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof."[1] The issue presented is whether this disclaimer violates the Establishment Clause.[2]

There is a plethora of jurisprudence interpreting this clause. While there have been decisions which have not named it specifically, the decision in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971) enunciated the seminal method of analysis (dubbed the *Lemon* test) to be employed

---

[1] The prohibitions contained in the First Amendment to the United States Constitution were rendered applicable to the states in the Fourteenth Amendment.

[2] Since the language in both the federal and state constitution are identical in this respect, the clauses at issue shall be referred to in the singular as "the Establishment Clause."

when determining whether governmental action runs afoul of the Establishment Clause, as follows:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citation omitted]; finally, the statute must not foster 'an excessive government entanglement with religion' [citation omitted].

403 U.S. at 612-613, 91 S.Ct. at 2111. If the proposed legislation does not satisfy each of these prongs, it violates the Establishment Clause. *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S.Ct. 2573, 2577 (1987).

There has been much criticism of the *Lemon* test by members of the Court, but nevertheless, as recently as June 23, 1997, the Supreme Court in *Agostini v. Felton*, __ U.S. __, 117 S.Ct. __, 1997 WL 338538 (1997), applied the *Lemon* test in analyzing whether the Title I program administered by the Board of Education of the City of New York violated the Establishment Clause. It concluded that "New York City's Title I program does not run afoul of any of the three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." This decision was delivered by Justice

O'Connor and joined by Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas.[3]

While several Justices have sought to abandon the *Lemon* test, even one of its most vehement detractors, Justice Scalia,[4]

---

[3] Justice Scalia has frequently been critical of the *Lemon* test, as this excerpt from his dissent in *Lee v. Weisman*, *Lee v. Weisman*, 505 U.S. 577, 644, 112 S.Ct. 2649, 2685 (1992) demonstrates:

> Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test [citation omitted], which has received well-earned criticism from many Members of this Court. . . . The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, . . . and the internment of that case may be the one happy byproduct of the Court's otherwise lamentable decision. Unfortunately, however, the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.

[4] In his concurrence in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S.Ct. 2141 (1993), Justice Scalia attacks the majority's application of the *Lemon* test, as follows:

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly

(Cont'd)

(Cont'd)

> sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six-feet under: our decision in *Lee v. Weisman*, 505 U.S. 577 *[585]*, 112 S.Ct. 2649, 2654 (1992), conspicuously avoided using the supposed 'test' but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so. [Citations omitted].

The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S.Ct. 1355, 1362 (1984) (noting instances in which Court has not applied *Lemon* test). When we wish to strike down a practice it forbids, we invoke it, see, e.g., *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232 (1985) (striking down state remedial education program administered in part in parochial schools); when we wish to uphold a practice it forbids, we ignore it entirely, see *March v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330 (1983) (upholding state legislative chaplains). Sometimes, we take a middle course, calling its three prongs 'no more than helpful signposts,' *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

(Cont'd)

has joined in the majority opinion in *Agostini*, which invokes the test in reversing its prior decisions in *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232 (1985) and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216 (1985) Thus, the *Lemon* analysis remains the method by which Establishment Clause challenges must be judged.

III.

In order to satisfy the first prong of the *Lemon* test, the resolution must have a secular legislative purpose. The Supreme Court in *Edwards v. Aguillard*, 482 U.S. at 585, 107 S.Ct. at 2578, studied the legislative purpose underlying the passage by the Louisiana Legislature of the "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act (Creationism Act). The *Edwards* Court analyzed both the official stated purpose and the motivations behind the promulgation of the statute, as

---

(Cont'd)

> For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced. . . . I will decline to apply *Lemon* — whether it validates or invalidates the government action in question — and therefore cannot join the opinion of the Court today.

113 S.Ct. at 2150. Nevertheless, Justice Scalia joined the majority opinion in *Agostini*, as did four other justices, with no mention of departing from the *Lemon* test. Thus, the rumors about the departure of *Lemon* have been greatly exaggerated. As made evident in *Agostini*, *Lemon* lives.

evidenced by the discussion of the legislative sponsor and other legislators, to determine the true purpose. The Court explained:

> A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose. This intention may be evidenced by promotion of religion in general [citation omitted], or by advancement of a particular religious belief [citation omitted]. If the law was enacted for the purpose of endorsing religion, 'no consideration of the second or third criteria [of *Lemon*] is necessary. *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 2489 (1985).

Edwards, 482 U.S. at 585, 107 S.Ct. at 2578. The Court remarked that:

> [The Supreme Court] has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Edwards, 482 U.S. at 584, 107 S.Ct. at 2577.

The *Edwards* Court noted that while the Creationism Act's stated purpose was to protect academic freedom, such a goal was not furthered by either the outlawing of the teaching of evolution or the mandating of the teaching of creation science. "While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards*, 482 U.S. at 586-587, 107 S.Ct. at 2579. In finding that the stated purpose was not the true reason that the Act was passed, the Court recognized that Louisiana public school teachers already possessed the flexibility "to supplant the presentation of theories, besides evolution, about the origin of life. [Teachers in Louisiana could teach any 'scientific concept that's based on established fact' prior to the passage of the legislation]. The Act provides Louisiana school teachers with no new authority." *Id*. The Court found that therefore the stated purpose is not furthered by the Act.

Instead, the *Edwards* Court found that "because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause." 482 U.S. at 595, 107 S.Ct. at 2583. The Act required that whenever evolution was taught in public schools, creationism, the religious viewpoint that a supernatural being created humankind, also be taught. In concluding that the Act had a religious purpose, the Court recognized that the true purpose fostered the Act was to restructure the science curriculum to conform with the doctrine of religious groups espousing as one of its primary tenets the belief that humans were created by a Divine Creator. No other science subject was burdened with the mandate that alternative theories be taught, although the

teachers had the flexibility prior to the Act to discuss a variety of theories about the origin of life.

In another decision touching upon the Establishment Clause's application in an elementary public school setting, the Supreme Court in *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479 (1985), found that an Alabama statute authorizing a period of silence for "meditation or voluntary prayer" was a law respecting the establishment of religion within the meaning of the First Amendment and thus was in violation of it. 472 U.S. at 41-42, 60, 105 S.Ct. at 2482, 2492. In reaching this conclusion, the Court explained the important policy reasons supporting the First Amendment's Establishment Clause, as follows:

> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion

derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects — or even intolerance among 'religions' — to encompass intolerance of the disbeliever and the uncertain. As Justice Jackson eloquently stated in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187 (1943):

> 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.
>
> The State of Alabama, not less than the Congress of the United States, must respect that basic truth.

Wallace, 472 U.S. at 52-55, 105 S.Ct. at 2487-2489.

The *Wallace* Court recognized that it was the first *Lemon* criterion, that of the secular or religious purpose of the resolution, which was most obviously at issue there, as in the present case. If the resolution does not have a clearly secular purpose, then consideration of the others is

unnecessary. While a proposed state act may be motivated in part by religion, it is unconstitutional "if it is entirely motivated by a purpose to advance religion." *Wallace*, 472 U.S. at 57, 105 S.Ct. at 2489.

In attempting to discern whether the government's purpose was to endorse or disapprove of religion in enacting the statute, the *Wallace* Court studied the legislative record and whether in fact, if the statute had not been passed, the Alabama students in the *Wallace* case would have had the right to pray during a moment of silence. The Supreme Court found that the purpose of the legislature in enacting a law authorizing a moment of silence for "meditation or silent prayer" was to "convey a message of state endorsement and promotion of prayer", not merely to protect every student's right to engage in voluntary prayer, since every student already had that right. Inasmuch as no law was required to protect a student's right to pray, the Court found that, in the absence of a finding that the statute had no meaning, it had no secular purpose. The *Wallace* Court concluded:

> Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion. The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority.

472 U.S. at 56, 60, 105 S.Ct. at 2489-90, 2491-92.

Appendix C

With this rich tapestry of jurisprudential guidance from the Supreme Court, this Court must determine whether the disclaimer resolution mandated by the School Board passes the constitutional test.

IV.

The School Board mandated that school teachers teaching the science lesson of evolution state that the School Board itself recognizes that this lesson is presented "to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept." The School Board also required that school teachers advise students that they have the right to form their own opinions on the theory of evolution, that they may "maintain beliefs taught by parents on this very important matter of the origin of life and matter" and that they "are urged to exercise critical thinking," "gather all information possible" and "closely examine each alternative toward forming an opinion." In the preamble to the disclaimer, the School Board states that it is intended as a "disclaimer from endorsement" of the theory of evolution.

A "disclaimer" is defined as "[a] repudiation or denial of a claim". Endorsement is "an act of endorsing," i.e., an act giving approval or sanction. *The American Heritage Dictionary of the English Language* (Houghton Mifflin Co. 1976). Thus, the School Board members intended to deny that it was approving the theory of evolution, yet the teaching of the theory of evolution is a required component of the curriculum of Louisiana Public Schools, including those in Tangipahoa Parish.

Appendix C

Both parties stipulated that critical thinking and gathering of information are encouraged in all classes, and specifically in science classes. It was also stipulated that "[e]ven before the Disclaimer resolution was adopted, teachers in Tangipahoa Parish had the right to mention viewpoints other than evolution to their students, and often discussed those viewpoints and encouraged students to explore them." Stipulations of Fact 9 and 10.

Therefore, it is undisputed that the teachers of Tangipahoa Parish public schools had the right to discuss alternate theories of the creation of life and could independently research such topics. It is also undisputed that there is no other scientific theory in the science curriculum of which the School Board disclaims endorsement. On no other topic in the science curriculum, or indeed in any other subject, does the School Board announce its intention *not to influence or dissuade* whatever opinion the student may already hold. Parents may deny consent to their children attending sex education or viewing the movie *Schindler's List*, but parental consent is not required prior to the teaching of any topic in the science curriculum, including evolution.

The discussion at the School Board meeting by the Board members, the public, and the sponsor of the resolution, E.F. Bailey, does not reveal a clearly secular purpose. Mr. Bailey candidly stated that he did not want evolution taught as fact because, in his opinion, it was terribly important that youngsters not believe that human lives were the result of "an accident", that students would be confused by the teaching of evolution because it did not coincide with what they learned in Sunday School, and that this is a "very

reasonable compromise" between the adoption of a policy allowing creationism to be taught, which was proposed and defeated a few months prior to the adoption of the disclaimer, and the teaching of evolution only in the science classes of the public schools of Tangipahoa Parish. Joint Exhibit 1, pp. 29-33.

In fact, it is patent that Bailey, and other School Board members, believed that teaching the theory of evolution is antithetical to the religious belief in the creation of life by a Divine Creator, that the proposal was introduced to satisfy similar religious concerns of majority of the constituency, and that if the proponents of Creation Science must accept the fact that it cannot be taught in the public schools, as it is taught in Sunday School, then the disclaimer is a "very reasonable compromise." Bailey also clearly underscored his fervent wish that the disclaimer be adopted so that the religious beliefs of students in Divine Creation not be undermined by the teaching of creation as an "accident" or by the "Big Bang theory", because other vital moral issues surround the importance of life, such as abortion and the crime rate. In fact, Bailey would not accept a proposal to delete the reference to "the Biblical version of Creation," because he believed it would "gut the basic message" of the disclaimer.

As hard as it tries to, this Court cannot glean any secular purpose to this disclaimer. While the School Board intelligently suggests that the purpose of the disclaimer is to urge students to exercise their critical thinking skills, there can be little doubt that students already had that right and are so urged in every class. The School Board also stresses

that the point is that the teachers advise the students that they have the right to form their own opinions or maintain the beliefs taught to them by parents or in Sunday School on the origin of life. This Court can hardly conceive that students do not already have that right, or are unaware that they have it, or conversely, in its absence, that teachers in Tangipahoa Parish public schools teach students that they do not have the right to believe in Divine Creation, if they so choose. As the *Wallace* Court recognized, if there is no clearly secular purpose to the act, the Court is left with but two conclusions: (1) the act was enacted for religious purposes, or to convey a message of endorsement of religion; or (2) the act had no purpose. In the absence of a finding that the School Board passed a meaningless or irrational resolution, the Court must find that the disclaimer was passed for religious reasons. A review of the all of the evidence presented leaves little doubt that the reasons for the adoption of the resolution were religious.

Even the School Board acknowledges the religious underpinnings of the disclaimer, if somewhat indirectly. It states in its Trial Brief that the "School Board approved the resolution as a means of responding to the sensibilities and sensitivities of a diverse, pluralistic student population and their parents" and as "a disclaimer from an official orthodoxy concerning a controversial topic upon which many hold strong but differing opinions." School Board Trial Brief, p. 2 and 3. These "sensibilities and sensitivities" are religious ones, however, because they relate to the espousal of parents and students of religion, "the expression of man's belief in and reverence for a superhuman power recognized as the creator and governor of the universe." *The American*

Heritage Dictionary of the English Language (Houghton Mifflin Co. 1976). What offends parents, students, and School Board members about the teaching of evolution, and the reasons which underlay the Creation Science proponents, is that the teaching of the scientific theory of evolution in public schools is not accompanied by the theory, indeed the belief, that a Supreme Being was the designer and creator of humankind.

The School Board, in disclaiming evolution as an official orthodoxy, is expressing its view that, if the students believe or have been taught that the theory of evolution is essentially a religious teaching, the School Board officially denies approving of such spiritual doctrine. There is no secular purpose to this official denial. While many of diverse religious beliefs may disagree with such a characterization of evolution, the manner and the contemporaneous proposal and adoption of the disclaimer, the discussions and comments at the School Board meeting during which it was passed, the testimony submitted at trial, and the historical context in which the subject arises, demonstrate by a preponderance of the evidence that religious concerns motivated the disclaimer.[5] In mandating this disclaimer, the School Board

---

[5] The Supreme Court in *Edwards* recognized this characterization of the theory of evolution, noting that the passage of the Creationism Act by the Louisiana state legislature was, by admission of a state senator:

> [T]o redress the fact that theory of evolution incidentally coincided with what he characterized as religious beliefs antithetical to his own. The legislation therefore sought to alter the science curriculum to reflect endorsement

(Cont'd)

(Cont'd)

> of a religious view that is antagonistic to the theory of evolution. In this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint. Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects. . . . [T]he legislature passed the Act to give preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator. . . . Similarly, the Creationism Act is designed *either* to promote the theory of creation science which embodies a particular religious tenet by requiring that creation science be taught whenever evolution is taught *or* to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught. The Establishment Clause, however, "forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma." [*Epperson v. Arkansas*, 393 U.S. 97, 106-107, 89 S.Ct. 266, 271 (1968) (statute forbidding the teaching of evolution invalidated). Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment.

Edwards, 482 U.S. at 593-594, 107 S.Ct. at 2582-2583. While many individuals who embrace Christianity or Judaism, and other religions, as their faiths believe both in the theory of evolution as a scientific explanation for the origin of life and in creation by a Divine Creator, it is evident that Bailey, who introduced the disclaimer, and the constituents on whose behalf he was acting, consider a belief in the theory of evolution and a belief in Divine Creation to be mutually exclusive.

is endorsing religion by disclaiming the teaching of evolution in such a manner as to convey the message that evolution is a religious viewpoint that runs counter to the religious belief of the Biblical theory of Creation, or other religious views. An endorsement of religion is a violation of the Establishment Clause and thus must be invalidated.

The Court understands the well-intentioned motivations of the sponsors of the resolution, the Board Members who voted for it, and the constituency who urged passage of it, and in no way intends to disparage those deeply held convictions which support the desire to encourage schoolchildren to maintain the religious or spiritual beliefs they are taught at home or in church. While encouraging students to maintain their belief in the Bible, or in God, may be a noble aim, it cannot be one in which the public schools participate, no matter how important this goal may be to its supporters. The reasons for the Establishment Clause to the Constitution of the United States have been recognized and reiterated by the Supreme Court in its many difficult confrontations with these issues, but it bears repeating that "[t]he place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality." *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 226, 83 S.Ct. at 1574 (1963).

Accordingly, for the above and foregoing reasons, the Court finds that the disclaimer is unconstitutional as it contravenes the Establishment Clause of the First Amendment, as made applicable to the states in the Fourteenth Amendment, of the United States Constitution, and Article 1, § 8 of the Louisiana Constitution. The Court shall enter judgment enjoining the reading of the disclaimer in the Tangipahoa Parish public schools and shall enter a declaratory judgment finding that the disclaimer violates the Establishment Clause of the United States Constitution, as contained in the First and Fourteenth Amendment, and Article 1, § 8 of the Louisiana Constitution.

Plaintiff is hereby directed to file any motion directed to the recovery of attorneys' fees and costs within 30 days of the date of entry of the judgment.

New Orleans, Louisiana, this 8 day of August, 1997.

s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States District Judge

No. 99-1625

In The

Supreme Court of the United States

TANGIPAHOA PARISH BOARD OF EDUCATION; E.F. BAILEY; ROBERT CAVES; MAXINE DIXON; LEROY HART; RUTH WATSON; DONNIE WILLIAMS, SR.; ART ZIESKE, in their capacities as members of the School Board; TED CASON, in his capacity as Superintendent of Schools,

Petitioners,

v.

HERB FREILER; SAM SMITH, individually and in his capacity as administrator of the estate of his minor child, Steven Smith; JOHN JONES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARJORIE R. ESMAN
Counsel of Record
A Professional Law Corporation
701 South Peters St., Suite 100
New Orleans, LA 70130
504-524-5328
Cooperating Attorney, ACLU Foundation of Louisiana

WILLIAM QUIGLEY
Loyola Law School
7214 St. Charles Ave., Box 902
New Orleans, LA 70118
504-861-5590
General Counsel, ACLU Foundation of Louisiana

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a school board has unlawfully advanced and endorsed religion by singling out the scientific theory of evolution as the sole topic in the curriculum subject to a mandatory disclaimer, when that disclaimer encourages students to adhere to the Biblical version of creation, was adopted immediately after the defeat of a proposed "Creation Science" curriculum, and was introduced specifically because its proponent believed that most students believe in the Biblical version of creation rather than in the scientific evidence.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

A. The Disclaimer's Context: 2

1. "Creation Science": The Background 2

2. The Adoption of the Disclaimer 3

B. The Disclaimer Was Adopted to Defeat Diversity, Not to Promote It 5

C. There Were No "Hurt Feelings" To Assuage 6

REASONS FOR DENYING THE WRIT 7

1. This Is Not an Exceptional Case 7

2. The Disclaimer Advances Religion in Violation of Settled Precedent 10

A. Public Schools Must be Neutral on Religious Matters 10

B. There is No Conflict in the Circuits on the Issues Raised, and the Decision Below is Fully Consistent with Controlling Law ... 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573 (1987) 3, 6, 8, 11

Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261 (1962) 10

Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266 (1968) 8, 11

Helland v. South Bend Community School Corporation, 93 F.3d 327 (7th Cir. 1996) 12

Lee v. Weisman, 505 U.S. 577 (1992) 10

Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971) 10, 11

Peloza v. Capistrano Unified School District, 37 F.3d 513 (9th Cir. 1994) 12

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 75 S.Ct. 614 (1955) 8, 9

Wallace v. Jaffree, 472 U.S. 38, 105 S.Ct. 2479 (1985) 10

Webster v. New Lenox School District No. 122 et al., 917 F.2d 1004 (7th Cir. 1990) 12

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 10

STATEMENT OF THE CASE

This case represents the latest in the continuing series of attempts to impose upon schoolchildren a religiously-based and doctrinal interpretation of life's origins and thereby to undermine both established science curricula and the benefits of a secular public education. Prohibited by the Constitution and Louisiana law from banning the teaching of evolution and from requiring the teaching of religious "alternatives," the Tangipahoa Parish Board of Education ("School Board") has sought to do through the back door what it cannot do through the front: instruct students not to believe their science teachers and the state-mandated science curriculum, but to adhere to religious interpretations of life's origins instead. This case, plain and simple, is about whether a school board may use its science classrooms to encourage its students to believe in religion over science. To pose the question is to answer it: a long line of decisions, of this Court and of lower ones, make it clear that a school board may do no such thing.

By disclaiming only evolution – the one element of the school curriculum that generates religious controversy – the School Board has violated both the constitutional mandate of neutrality toward religion and its obligation to provide its students with secular educations free from religious indoctrination or partisanship. The Fifth Circuit twice correctly recognized the impropriety of the School Board's thinly disguised efforts to impose a religious view on its students, and twice declared the disclaimer statement unconstitutional. *Freiler, et al. v. Tangipahoa Parish Board of Education, et al.*, 185 F.3d 337 (5th Cir. 1999) ("*Freiler I*"); *Freiler, et al. v. Tangipahoa Parish*

Board of Education, et al., 201 F.3d 602 (5th Cir. 2000) ("*Freiler II*"). Because those rulings were correct, this Court should deny the request for certiorari.

The Opinion on which the Petition is based is expressly limited to the factual context of this Disclaimer (Appendix A to Petition, p. 2a). The Petition misstates those facts in several material respects, notably by mischaracterizing the Disclaimer's stated purpose and its pertinent history. The District Court issued extensive findings of fact, all based on a stipulated record. Those facts were repeated by the Fifth Circuit in *Freiler I* and have not been challenged. (Appendix B to Petition, pp. 18a-20a and fn. 4 at 30a). Because the Opinion subject to review is explicitly fact-based, a correct accounting of the facts is critical.

A. The Disclaimer's Context:

1. "Creation Science": The Background

The Disclaimer did not arise in a vacuum. Over a period of weeks shortly before the Disclaimer was introduced, members of the School Board (including the Disclaimer's proponent) engaged in an unsuccessful attempt to have "religious materials" – including a full-blown "Creation Science" curriculum – introduced into the schools. The matter of "religious materials" was initially taken up by the curriculum committee where it was defeated. (Appendix C to Petition, pp. 39a-40a.) Despite its defeat in committee the proposal, including the "Creation Science" curriculum, was brought before the full School Board for consideration. By a 5-4 vote, the School Board voted not to adopt the "religious materials" policy.

(Appendix C to Petition, p. 40a). It was a few weeks after this defeat that the Disclaimer was proposed and adopted. (*Id.*)

2. The Adoption of the Disclaimer

The Disclaimer was introduced to the entire School Board rather than to the curriculum committee, where it belonged, because the committee had failed to approve the "Creation Science" curriculum. (Appendix C to Petition, p. 41a).[1] At the meeting at which the Disclaimer was proposed and adopted, Bailey (its proponent) made it clear that he wanted the Disclaimer precisely because he believed his constituents "do not share the belief in evolution, that they believe the Biblical version of creation, and that they 'resent their children being confused with the presentation of the theory of evolution.' " (Appendix C to Petition, pp. 46a-47a).

In debating the Disclaimer, the School Board rejected a motion to delete the reference to the "Biblical version of creation." The motion failed because, in Bailey's words, "I couldn't accept that and I think you deserve to hear why.

---

[1] The School Board seeks praise for the fact that it never sought to eliminate evolution from the curriculum. Because this Court has ruled that school boards may not alter their curricula to eliminate evolution, *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573 (1987), and because Louisiana public schools are required to teach evolution (Appendix C to Petition, p. 58a), the School Board has no choice in this matter. It was trying to tamper with the curriculum in the only way it could: to add a religious "alternative" to evolution and to discourage students from believing in the required science curriculum. The School Board is not entitled to kudos for following the law.

I think that by that, you've gutted the basic message of this document." (Appendix C to Petition, p. 43a). In other words, the "basic message" of the Disclaimer – as stated by Bailey and endorsed by the School Board – was the reference to the Bible. Bailey emphasized (without empirical support) that he believes that "perhaps 95 percent" of the students believe in divine creation, and that he wanted the Disclaimer to ensure that students wouldn't be confused by perceived discrepancies between what they learn in school and what they learn in Sunday School. (Appendix C to Petition, pp. 43a-45a).

Although the text of the Disclaimer purports to encourage students to explore "alternatives" to evolution, the District Court correctly observed that in the debate leading up to its adoption no School Board member listed any non-religious theory as "alternatives."(Appendix C to Petition, p. 46a).[2] All of the "other concepts" which School Board members discussed were religious, including the Biblical, as well as Hindu, Islamic, or American Indian versions (*Id.*). Discussions centered on the premise that children should not be taught evolution as "fact" because it conflicts with what they learn in Sunday School. (Appendix C to Petition, p. 47a). There were no expressed concerns about perceived conflicting secular explanations for the origins of life.

---

[2] Both the record and common sense indicate that there are no such non-religious "alternatives." Respondents offered a report of an expert witness precisely to that effect. That report was unrefuted by the School Board.

B. The Disclaimer Was Adopted to Defeat Diversity, Not to Promote It

The School Board posits that the Disclaimer was intended to address a diversity of beliefs in the school system, yet the facts show just the opposite. As the District Court recognized, "during the discussion of the proposed resolution, no Board member stated that the reason the disclaimer was being introduced was to urge students to exercise their critical thinking skills or to examine all alternatives when forming opinions, purposes later embraced by Board members in depositions or in trial testimony." (Appendix C to Petition, p. 47a). In fact, the Disclaimer was adopted to bring the curriculum in line with the religious beliefs of what Bailey stated to be 95% of the students. The discussion focused on concerns for Christian students who, for religious reasons, may not want to learn the theory of evolution. *Id.*

Nor was the reference to the Bible intended as "illustrative," as the School Board now would have it. (Petition, p. 8). As the *Freiler I* decision explains, the reference to the Bible was not illustration but the basic message. (Appendix B to Petition, fn. 4, p. 30a). This is not, as the School Board now contends, an attempt to promote diversity or pluralism in the schools.[3] It is an attempt by

---

[3] The dissent in *Freiler II* misinterpreted the facts in stating that the purpose of the Disclaimer was to "advance tolerance and respect for diverse viewpoints." (Appendix A to Petition, pp. 12a-13a). As the District Court found and *Freiler I* affirmed, the record contains no evidence that tolerance and respect for diversity were part of the discussions. The evidence is to the contrary: The Disclaimer was proposed precisely to advance

adherents to a particular religious doctrine to impose that doctrine on the teaching of science.

Moreover, evolution is the only topic in the curriculum that the School Board disclaims. (Appendix C to Petition, pp. 41a-48a). As this Court has found, objections to evolution are religiously based, and evolution is the one topic in a school curriculum that is religiously controversial. *Edwards v. Aguillard*, 482 U.S. 578, 593, 107 S.Ct. 2573, 2582 (1987). If the School Board really wants to encourage diversity of beliefs among its students, it would disclaim all manner of information, and would encourage students at all times and in all contexts to "exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion." Singling out the religiously charged topic of evolution for such treatment shows that the School Board intends critical thinking to apply only to that subject. Under these facts, the Disclaimer clearly advances and endorses religion.

C. There Were No "Hurt Feelings" To Assuage

The School Board's post-hoc rationalization of the Disclaimer portrays it as an attempt to assure students that they may maintain their own opinions. However, the facts show that the Disclaimer was proposed not because of any expressed concern by students, but to impose the

---

what its proponent insisted was the religious view of 90% or 95% of the students. Attempts to incorporate references to minority religious beliefs, such as Hindu, Muslim, American Indian, or others were explicitly rebuffed. (Appendix C to Petition, pp. 42a-43a).

religious beliefs of School Board members. The Disclaimer did not arise out of a student complaint, and there is no evidence that "hurt feelings" ever existed among students on this issue. In fact the reverse is true. Before the Disclaimer was adopted, students had the right to – and did – discuss "alternative" concepts with their teachers on an individual basis. (Appendix C to Petition, p. 47a). There were no student "outsiders" before the Disclaimer, as the School Board now claims (Petition, p. 21). To the contrary, everyone was included: teachers responded to student concerns individually as they arose, and all had the opportunity to discuss whatever concepts they wanted with their teachers. Only with the passage of the Disclaimer was there the chance of students becoming outsiders, because the Disclaimer mandates a specific reference to the "Biblical version of Creation," consistent with the religion of School Board members but not with that of all of the students.

REASONS FOR DENYING THE WRIT

This case does not meet any of the criteria of this Court for granting certiorari. It is not an exceptional case; the decision is in accord with established law; and there is no conflict among the circuits.

1. This Is Not an Exceptional Case

The Fifth Circuit, in both its panel decision and in denying rehearing en banc, limited its opinion to the specific facts of this case. In *Freiler I* the court stated "[w]e limit our analysis to the precise language of the

disclaimer and the context in which it was adopted. We do not confront the broader issue of whether the reading of any disclaimer before the teaching of evolution would amount to an unconstitutional establishment of religion." *Freiler I*, (Appendix B to Petition, p. 20a). Affirming, the court in *Freiler II* said "[W]e decide only that *under the facts and circumstances of this case*, the statement of the Tangipahoa Parish School Board is not sufficiently neutral to prevent it from violating the Establishment Clause." *Freiler II*, (Appendix A to Petition, p.2a, emphasis supplied).[4] Confined as it is to its specific facts, this is a narrow ruling that does not warrant review.[5]

Certiorari is not appropriate in cases of isolated violations not likely to recur. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S.Ct. 614 (1955). "Special

---

[4] It is obvious from *Freiler I* that the ruling in *Freiler II* was not intended to affirm the constitutionality of evolution disclaimers generally. *Freiler I* specified the pertinent facts, including the history of the failed "Creation Science" curriculum and the discussions at the meeting when the Disclaimer was adopted. (Appendix B to Petition, fn. 1 and pp. 16a-18a). The court in *Freiler II* was obviously referring to the facts it had already found in saying that *this* disclaimer, under *these* facts, fails constitutional muster.

[5] That teaching evolution may be of emotional import to people in Tangipahoa Parish – or, more accurately, to members of the School Board – does not justify intervention by this Court. This Court long ago made it clear that school systems may not tamper with the state-mandated teaching of evolution, e.g. *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266 (1968); *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573 (1987). The School Board's dissatisfaction with this Court's clear rulings is not sufficient justification for certiorari.

and important reasons" warranting the grant of certiorari "imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." *Id.*, 349 U.S. 70, 74. Following *Rice*, and in accordance with this Court's duty to refrain from needlessly deciding constitutional issues, certiorari should be denied in this case, which is confined to a narrow set of facts unlikely to recur.

Under the Opinion subject to review, any future disclaimer statements will have to be examined individually, for their histories, contexts, and specific contents. It is a virtual certainty that the precise facts of this Disclaimer – arising just after the defeat of a "Creation Science" curriculum, adopted specifically because it includes a reference to the Bible and out of an expressed concern for the 90-95% of Christian students who adhere to Biblical precepts – will not recur elsewhere. This is as isolated a violation as any can be, and for that reason it is not appropriate for this Court's review.[6]

---

[6] The School Board would like this to be an "exceptional case" simply because it claims to have been acting to reduce the possibility of offense occasioned by the teaching of evolution. (Petition, p. 8). However, a public school system is under no obligation to avoid offending its students or their parents in matters of curriculum. In fact the reverse may be true: it is the duty of a school to challenge its students and to broaden their minds and their horizons, not to spoon-feed only what they already know.

2. The Disclaimer Advances Religion in Violation of Settled Precedent

A. Public Schools Must be Neutral on Religious Matters

This Court noted a long time ago that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). Consistent with that ruling, this Court has long held that public schools may not choose sides in religious controversies. Respect for the religious views of all Americans, particularly schoolchildren, requires that public schools remain neutral on religious matters. *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 2486 (1985), *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261 (1962). "It is a cornerstone principle of our Establishment Clause jurisprudence that public schools not seek to influence religious choices of students." *Lee v. Weisman*, 505 U.S. 577, 588 (1992). As a matter of settled law, the religious views of the majority in Tangipahoa Parish may not determine the nature of the school curriculum.

Critical to the application of the *Lemon* endorsement test, *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971), is an understanding of the facts and context of the Disclaimer.[7] Evolution is the only topic in the Tangipahoa Parish schools subject to such a disclaimer. It is singled

[7] Respondents believe that the Disclaimer violates the "purpose" prong of the *Lemon* test as well as the endorsement prong, and to that extent they believe that the Fifth Circuit erred in *Freiler I*.

out because School Board members have a religious objection to it. This is *per se* endorsement of religion under any possible analysis of *Lemon* or any other decision of this Court.[8] The Fifth Circuit, in both its panel and en banc opinions, correctly applied the law on endorsement. This matter therefore does not warrant review.

B. There is No Conflict in the Circuits on the Issues Raised, and the Decision Below is Fully Consistent with Controlling Law

The law is well settled that schools may not seek to advance a religious alternative to evolution. *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266 (1968) (striking down a ban on teaching evolution); *Edwards v. Aguillard*, 482 U.S. 587, 107 S.Ct. 2573 (1987) (invalidating mandatory teaching of "Creation Science"). Over the years there have been many unsuccessful attempts to introduce "Creation Science" into public school curricula, or otherwise to undermine the teaching of science by introducing religious beliefs. Based on long-established precedent of this Court, to date no lower court has permitted such an

[8] The School Board makes much of the panel's initial substitution of the word "and" for "or" in one sentence of the Disclaimer, positing that the Disclaimer does not endorse religion because it encourages students to form their own opinions rather than to adhere to those of their parents. However, because any non-scientific "opinion" about life's origins is by definition religious, the court in *Freiler II* properly acknowledged that this error was a distinction without a difference.

intrusion of religion into the science classroom. E.g. *Peloza v. Capistrano Unified School District*, 37 F.3d 517 (9th Cir. 1994) (upholding a teacher's obligation to teach evolution despite a religious objection); *Helland v. South Bend Community School Corporation*, 93 F.3d 327 (7th Cir. 1996) (upholding termination of substitute teacher who, among other things, taught creationism in a fifth-grade science class); *Webster v. New Lenox School District No. 122, et al.*, 917 F.2d 1004 (7th Cir. 1990) (upholding prohibition against teaching "nonevolutionary theories of creation"). The unanimity with which appellate circuits have struck down all attempts to introduce religious "alternatives" to evolution is further indication that the law in this area is settled, that there is no conflict among the circuits, and that this case does not warrant certiorari.

CONCLUSION

For all of the above reasons, Respondents submit that the Petition for Certiorari should be denied.

Respectfully submitted,

MARJORIE R. ESMAN
Counsel of Record
701 South Peters St., Suite 100
New Orleans, LA 70130
504-524-5328

Cooperating Attorney, American
Civil Liberties Union of Louisiana

WILLIAM QUIGLEY
General Counsel, American
Civil Liberties Union of Louisiana
7214 St. Charles Ave.
New Orleans, LA 70118
504-861-5590

Attorneys for Respondents

(2)

No. 99-1625

Supreme Court, U.S.
FILED
MAY 1 1 2009
CLERK

IN THE

Supreme Court of the United States

TANGIPAHOA PARISH BOARD OF EDUCATION; E.F. BAILEY; ROBERT CAVES; MAXINE DIXON; LEROY HART; RUTH WATSON; DONNIE WILLIAMS, SR.; ART ZIESKE, in their capacities as members of the School Board; TED CASON, in his capacity as Superintendent of Schools,

Petitioners,

v.

HERB FREILER; SAM SMITH, individually and in his capacity as administrator of the estate of his minor child, Steven Smith; JOHN JONES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

KENNETH F. SILLS
HAMMOND & SILLS
1111 South Foster Drive
Baton Rouge, LA 70806
(225) 923-3462

CHRISTOPHER M. MOODY
CASHE, LEWIS, MOODY & COUDRAIN
106 South Magnolia Street
Hammond, LA 70404
(504) 542-6848

BARRY W. ASHE
Counsel of Record
WILLIAM D. TREEBY
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON, L.L.P.
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

Attorneys for Petitioners

159726

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

16 pp

TABLE OF CONTENTS

	Page
Table Of Cited Authorities	ii
I. Respondents Mischaracterize The Fifth Circuit's Legal Decision As Fact-based To Distract This Court From The Plain Language Of The Disclaimer.	2
II. This Court Should Grant The Writ.	7
A. This Case Is Of Exceptional Importance. ...	7
B. To Avoid Repetition, The Fifth Circuit's Erroneous Application of the Endorsement Test and *Lemon's* "Effects" Prong Should Be Corrected.	9
C. The Decision Below Stands In Conflict With Interpretations Of The "Effects" Prong By This Court, Other Circuits, And The Fifth Circuit Itself.	9
Conclusion	10

TABLE OF CITED AUTHORITIES

Cases:	Page
Doe v. Duncanville Ind. School Dist., 70 F.3d 402 (5th Cir. 1995)	4
Edwards v. Aguillard, 482 U.S. 578, 107 S. Ct. 2573 (1987)	3, 4, 5, 6, 7, 9, 10
Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266 (1968)	9
Helland v. South Bend Community School Corp., 93 F.3d 327 (7th Cir. 1996), *cert. denied*, 519 U.S. 1092 (1997)	9
Ingebretsen v. Jackson Public School Dist., 88 F.3d 274 (5th Cir.), *cert. denied*, 117 S. Ct. 388 (1996)	4
Jones v. Clear Creek Independent School Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993)	4
Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971)	2, 9
Peloza v. Capistrano Unified School Dist, 37 F.3d 517 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995)	9

Cited Authorities

	Page
Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510 (1995)	4
School Dist. of Abington Township v. Schempp, 374 U.S. 203, 83 S. Ct. 1560 (1963)	4
Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927)	7
Stone v. Graham, 449 U.S. 42, 101 S. Ct. 192 (1980)	4
Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733 (1969)	3
Webster v. New Lenox School Dist, 917 F.2d 1004 (7th Cir. 1990)	9
West Virginia State Board of Ed. v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943)	6
Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269 (1981)	4

Cited Authorities

	Page
Statute:	
20 U.S.C. §§ 4071-4074	4
Other Authorities:	
Evolution Falls From Curriculum, N. Orleans Times-Picayune, Aug. 12, 1999	7, 8
Gibeaut, *Evolution of a Controversy*, 85 A.B.A.J. 50 (Nov. 1999)	8
Henry, *Teach evolution as science*, USA Today, Mar. 13, 2000	8
Kansas Eliminates Evolution From Public School Curriculum, Wash. Post, Aug. 12, 1999	8
Marlantes, *The Evolution of a Controversy*, Christ. Sci. Monitor, Dec. 23, 1999	7
Poll: Americans Accept Evolution and Creationism, N. Orleans Times-Picayune, Mar. 11, 2000	8

Petitioners respectfully reply to the Respondents' Brief in Opposition ("Oppos.") to the School Board's petition for a writ of certiorari. In an exaggerated manner, the Respondents distort the factual record in this case seeking to distract this Court from the plain language of the disclaimer and the myriad of reasons supporting this Court's review of this case.

Respondents begin with a misleading and inaccurate reading of the disclaimer itself. Contrary to Respondents' suggestion, the disclaimer does not "instruct students not to believe their science teachers and the state-mandated curriculum," nor does it instruct students "to adhere to religious interpretations of life's origins." Oppos. at 1. Neither does the disclaimer encourage "students to adhere to the Biblical version of creation," *id.* at i, or "impose upon schoolchildren a religiously-based and doctrinal interpretation of life's origins." *Id.* at 1. Instead, the disclaimer advises students that evolution should be taught, and encourages critical thinking on the complicated issue of life's origin. In the text of the disclaimer itself, the Board expressly acknowledges each student's right to form opinions *or* maintain beliefs about life's origin, notwithstanding the intention of the school system to teach only evolution. This is not religious indoctrination, as the Respondents suggest; the disclaimer is instead the School Board's effort to render the classroom a more comfortable environment for all students to learn, including those students whose views about life's origin may differ from the lesson presented to them. In an era when "political correctness" is being challenged as an inauthentic substitute for genuine pluralism in our country, a school board may surely be allowed to avoid the imposition of official orthodoxy by encouraging students to think critically about controversial ideas and to form their own conclusions about them. That is what the disclaimer at issue in this case does.

I. RESPONDENTS MISCHARACTERIZE THE FIFTH CIRCUIT'S LEGAL DECISION AS FACT-BASED TO DISTRACT THIS COURT FROM THE PLAIN LANGUAGE OF THE DISCLAIMER.

The issue presented in this case is whether the disclaimer, which has never been read, endorses religion or has the primary effect of advancing religion. None of the alleged "facts" recited by Respondents is relevant to this issue. The only facts that *are* relevant are the words of the disclaimer itself. In particular, as was recognized by Judge Barksdale and the other dissenters from the Fifth Circuit's en banc denial, the apparently determinative "fact" for the panel was the disclaimer's mention of the Bible. Petitioners have demonstrated in their Petition that this illustrative reference to the Bible cannot render unconstitutional a disclaimer the Fifth Circuit observed would otherwise be constitutional. Petition at 15-16.

This case should turn on the wording of the disclaimer, not the motives that may have impelled some of the members of the School Board to vote in favor of it. Thus, this Court should not be distracted by Respondents' detour into the irrelevant. In a passing reference, Respondents note their belief that the Fifth Circuit erred in holding that the disclaimer satisfied the "purpose" prong of the *Lemon* test, Oppos. at 10 n.7, but they did not preserve this issue for further review since they failed to file timely a cross-petition for a writ of certiorari. Accordingly, the constitutionality of the disclaimer's purposes is now a part of the law of the case, and Petitioners' belated effort to insinuate the issue is both untimely and irrelevant.

Nonetheless, Petitioners are compelled to correct any misimpression that may have been left by the Respondents' distorted recitation of the context leading up to the disclaimer's adoption by the Board.[1] From the outset of this case, Respondents have sought

[1] Respondents claim that the Petition misstates the factual context of the disclaimer "in several material respects," Oppos. at 2, but they fail to point specifically to a single factual misstatement in the Petition. (Cont'd)

to lump together two distinct events — namely, the enactment of the disclaimer and what Respondents have been wont to describe incorrectly as an "unsuccessful attempt to have 'religious materials' — including a full-blown 'Creation Science' curriculum — introduced into the schools." Oppos. at 2. If relevant at all to this case, the religious materials inquiry goes to demonstrate that this case is *not* a rerun of *Edwards v. Aguillard*, 482 U.S. 578, 107 S. Ct. 2573 (1987), but was a genuine effort to apply the teachings of this Court concerning religion in public schools to the specific circumstances of Tangipahoa Parish. Viewed in this light, the outcome of the inquiry actually reinforces the constitutionality of the disclaimer. The Board acted in full cognizance of this Court's ruling in *Aguillard*, and it did nothing to challenge or undermine that ruling. Contrary to the vague impression left by Respondents, the Board did not adopt any resolution rejecting the teaching of evolution in its school curriculum.

Instead, responding to inquiries and requests of constituents, the School Board in the fall of 1993 explored the adoption of a policy to "clarify the use of, and conditions under which religious materials and discussions on religion may be included in the curriculum and in student activities on public school property."[2] The effort was broadly directed, addressing (1) the prohibition against the school system's promotion and disparagement of religious belief or nonbelief,[3] (2) the study of religious materials and religion as a part of a secular program

(Cont'd)
By contrast, all of the facts related in the Petition and this Reply Brief are set forth in the stipulated record and the documents incorporated therein.

[2] *Policy on the Inclusion of Religious Materials and Discussion on Religion in the Curriculum and in Student Activities* (Record at 1502).

[3] *Id.* (citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969)).

of education,[4] (3) the study of theories of the origin of mankind,[5] (4) class discussions and activities related to holiday observances,[6] (5) the free speech rights of students to discuss and to distribute religious material,[7] (6) graduation ceremony prayer,[8] and (7) student meetings for purposes of religious, political and philosophical discussion and study.[9] Even a cursory review of the School Board's deliberate examination of the legal and educational considerations for a policy reveals that the Board, far from acting improvidently and in dereliction of constitutional limitations, paid careful heed to the guidance provided by our courts. Notably, the Board's religious materials inquiry paralleled a similar initiative by the Departments of Justice and Education, at President Clinton's urging, "to provide school officials with guidance [concerning] the extent to which religious expression and activities are permitted in public schools."[10]

[4] *Id.* (citing *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963); *Stone v. Graham*, 449 U.S. 42, 101 S. Ct. 192 (1980); and *Aguillard*).

[5] *Id.* (citing *Aguillard).*

[6] *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981)).

[7] *Id.* at 2 (citing various district court decisions pre-dating *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995)).

[8] *Id.* (citing *Jones v. Clear Creek Independent School Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993), and steering clear of policy elements subsequently declared unconstitutional in *Doe v. Duncanville Ind. School Dist.*, 70 F.3d 402 (5th Cir. 1995), and *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274 (5th Cir.), *cert. denied*, 117 S. Ct. 388 (1996)).

[9] *Id.* (citing the Equal Access Act, 20 U.S.C. §§ 4071-4074).

[10] *Duncanville*, 70 F.3d at 409 n.1 (Jones, J., concurring) (quoting News Release of U.S. Dep't of Education, Aug. 17, 1995). *See* Record at 1536 (copy of the News Release, including letter of Secretary Riley and statement of principles); Record at 1514 (President Clinton's speech regarding "religious expression in public schools").

The religious materials inquiry in Tangipahoa Parish largely eventuated in the policy of clarification which was its goal.[11] Only the paragraph concerning the study of theories about life's origin sparked any extended discussion.[12] Paragraph 3 of the initial policy draft[13] and paragraph 3 of the revised policy draft[14]

[11] *See* Minutes of Education/Curriculum Committee Meeting, Feb. 21, 1994 (Record at 1521) (items 1, 2, 4, 5 and 6 forwarded to Board for approval with item 7 omitted because already covered under Equal Access Act); Minutes of School Board Meeting, Mar. 1, 1994 (Record at1525) (approving items 1, 2, 4 and 5). *See also* App. C to the Petition, at 39a-40a.

[12] Viewpoints on various sides of this topic, including those of creation science advocates as well as rigid evolutionists, were voiced at public meetings held by the Education/Curriculum Committee concerning the broader inquiry regarding religious materials in the schools. *See* Minutes of Education/Curriculum Committee Meeting, Dec. 15, 1993 (Record at 1508); Minutes of Education/Curriculum Committee, Feb. 21, 1994 (Record at 1521). At the December 15, 1993 meeting, the lead plaintiff in this case aired his views generally "that religious beliefs [should] be taught in church or . . . home." However, Mr. Freiler went further to deride religious belief, asking "to know when the meeting on Elvis sightings would be forthcoming," and he encouraged "an objective religion course in schools" to "discuss how man created God or the evolution of religion." (Record at 1508, p. 6.) *See also* Transcript (Record at 1471) (where Mr. Freiler refers to "the tremendous amusement value of" religion). Such derision points further to the need in this controversial area for a policy like the disclaimer that recognizes everyone's right to believe or not to believe as their conscience or faith leads them, without fear of ridicule or of contravening an institutionalized orthodoxy of belief on this topic.

[13] Paragraph 3 of the initial policy draft reads: "The study of a variety of theories about the origin of mankind may be included if done with the clear secular intent of enhancing the effectiveness of science instruction." *Policy on the Inclusion of Religious Materials* (Record at 1502) (citing *Aguillard* itself).

[14] Paragraph 3 of the revised policy draft reads: "Although the Tangipahoa Parish School Board recognizes that it cannot promote nor condone the teaching of Creation Science or any other religion-based theory of the origin of man, there is no prohibition on any student conducting individual, voluntary studies of these topics." *Revised Draft of Policy* (Record at 1519).

addressed study of theories of the origin of man. In each instance, the draft policies took pains to comply carefully with *Aguillard*.[15] And, most importantly, in the end, the School Board *declined to adopt any paragraph clarifying the teaching of theories about life's origin* — an action that itself should be the best evidence of the Board's intent to avoid constitutional infirmity.

The disclaimer was proposed and adopted to assuage the concerns voiced by students and parents about the incongruity they perceived between their own beliefs about life's origin and what is taught in school. Thus, the motives for the disclaimer's adoption are both political and pedagogical. To ensure that the school audience understood that adherence to other concepts of life's origin other than evolution would not render them second-class citizens in the school community, the Board deemed it essential to include the illustrative phrase, "the Biblical version of creation." Given the tenor of the message, the illustration was critical to sending the community the message that the School Board was disavowing official governmental orthodoxy in precisely the same sense in which this Court expressly did so in the second flag salute case. *See West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 640-42, 63 S. Ct. 1178, 1186-87 (1943).

That message is evident from the text of the disclaimer. But to emphasize how far the courts below strayed from the text, one need go no farther than the Respondents' quotation of the district court that "during the discussion of the proposed resolution, no Board member stated that the reason the disclaimer was being introduced was to urge students to exercise their critical thinking skills or to examine all alternatives when forming opinions . . ." Oppos. at 5. Of course, discussion was unnecessary on this point since the text of the disclaimer itself explicitly urges students "to exercise critical thinking and gather

[15] The district court thus erred in suggesting that the draft policy and revised draft "allow[ed] the teaching of Creation Science," App. C to Petition at 39a, especially in view of the express language of the revised draft. *See supra* note 14.

all information possible and closely examine each alternative toward forming an opinion." Petition at 2. The first place a court should go to identify the reasons for a statute's adoption is the text of the statute itself.

Respondents urge that the dissent from the en banc denial wrongly concluded that the disclaimer was adopted to "advance tolerance and respect for diverse viewpoints," because a large percentage of the community was purportedly Christian. Oppos. at 5. Respondents fail to appreciate that the school curriculum is perceived by some within this number to be at odds with their beliefs about life's origin. From this perspective, the disclaimer advances tolerance and respect for those with such viewpoints by disclaiming the notion that, in teaching only evolution, the School Board was endorsing an evolution-only orthodoxy. In this sense, diversity is advanced by addressing the voiced concerns of adherents to viewpoints (even if those of a majority) otherwise excluded in the school community.

II. THIS COURT SHOULD GRANT THE WRIT.

A. This Case Is Of Exceptional Importance.

Anyone familiar with the American experience of teaching evolution in public schools, from *Scopes* to *Aguillard*, fully appreciates the exceptional nature of this case. This controversy shows no signs of waning, certainly so long as the concerns of certain parents and schoolchildren are perceived as being frustrated or left unaddressed. While several states and local school authorities use or have attempted to use disclaimers to address the controversy,[16] other jurisdictions have employed

[16] *See, e.g.*, Marlantes, *The Evolution of a Controversy*, Christ. Sci. Monitor, Dec. 23, 1999, at 14 (noting adoption by Oklahoma officials of textbook disclaimer akin to disclaimer in force in Alabama since 1995); *Evolution Falls From Curriculum*, N. Orleans Times-Picayune, Aug. 12, 1999 (describing disclaimer appended to biology textbooks in Alabama, which states, in part, that evolution is "a controversial theory some scientists present as a scientific explanation for the origin of living things. . . . No one was present when life first appeared on earth. Therefore, any statement about life's origins should be considered as theory, not fact. . . .").

other means, some of which arguably depreciate the importance of evolution in the educational curriculum.[17] While no two cases are likely to present a precise identity of facts (the mistaken standard for certiorari urged by Respondents), recent actions across the country demonstrate that the controversy at the core of this case has been and will continue to be addressed by means akin to the disclaimer, under circumstances similar to those present in this case. Hence, this case affords this Court an historic opportunity to help quell the controversy by holding that the disclaimer at issue comports with the Constitution.

The issue presented in this case — an application of the endorsement and "effects" tests to a 173-word disclaimer — is not fact intensive, and the decisions of the courts below were not fact-driven. To suggest otherwise (as do Respondents) underscores the inescapable importance of correcting the manner in which federal courts apply these tests to legislative acts challenged on their face, rather than as applied.

---

[17] *See* Petition at 9 n.9 (collecting articles recounting the Kansas State Board of Education's elimination last year of evolution from statewide standardized testing); Henry, *Teach evolution as science*, USA Today, Mar. 13, 2000, at 11D (noting Kentucky's recent deletion of the word "evolution" from state science guidelines, substituting the phrase "change over time"); *Poll: Americans Accept Evolution and Creationism*, N. Orleans Times-Picayune, Mar. 11, 2000, at A16 (recounting recent action at charter school in Rochester, New York, and protests over including evolution in curriculum guidelines in Ohio); Gibeaut, *Evolution of a Controversy*, 85 A.B.A.J. 50 (Nov. 1999); *Kansas Eliminates Evolution From Public School Curriculum*, Wash. Post, Aug. 12, 1999, at A13 (referencing attempts in Alabama, Arizona, Georgia and Nebraska "to eliminate evolution in public schools"); *Evolution Falls From Curriculum*, N. Orleans Times-Picayune, Aug. 12, 1999 (referencing changes concerning evolution's place in curriculum enacted or proposed in Alabama, New Mexico, Nebraska, Texas, Ohio, Washington, New Hampshire and Tennessee).

B. To Avoid Repetition, The Fifth Circuit's Erroneous Application of the Endorsement Test and *Lemon's* "Effects" Prong Should Be Corrected.

That the Fifth Circuit erred in its application of the endorsement test and the "effects" prong to the disclaimer at issue is demonstrated in the Petition. Petitioners note only that this Court should grant review to correct this error now, so that other courts will not resort to the "effects" prong as a means of striking down other governmental acts that have never been implemented, are imbued with permissible, secular purposes, and are unlikely to have any effect of advancing or endorsing religion.

C. The Decision Below Stands In Conflict With Interpretations Of The "Effects" Prong By This Court, Other Circuits, And The Fifth Circuit Itself.

Petitioners have reviewed the manner in which the Fifth Circuit's application of the "effects" prong in this case conflicts with decisions of this Court, other Circuits, and the Fifth Circuit itself. Petition at 22-24. Petitioners observe here only that this case is easily distinguished from the cases cited by Respondents in their Opposition, which cases involved a ban on the teaching of evolution, *see Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266 (1968), balancing the teaching of evolution with the teaching of creation science, *see Aguillard*, a teacher's refusal to teach evolution on grounds of his personal, religious beliefs, *see Peloza v. Capistrano Unified School Dist*, 37 F.3d 517 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995), and a teacher's insistence on teaching creationism. *See Helland v. South Bend Community School Corp.*, 93 F.3d 327 (7th Cir. 1996), *cert. denied*, 519 U.S. 1092 (1997); *Webster v. New Lenox School Dist*, 917 F.2d 1004 (7th Cir. 1990). In contrast to these cases, the disclaimer at issue recites the School Board's conviction that evolution *should* be taught, and it does not require or condone the teaching of creationism. The disclaimer merely acknowledges that students may adhere to "other concepts" about life's origin without sacrificing their standing in the school community.

Respondents mischaracterize this case as the latest in a line of anti-evolution cases, merely because it deals with the issue of teaching evolution in public schools. Thus, Respondents paint the religious materials inquiry as a conspiracy to introduce creation science into the public school curriculum, and the disclaimer as a step toward this end. But the disclaimer contains no reference whatsoever to creation science, and the religious materials inquiry simply involved the School Board's efforts to clarify legitimate issues that had also caught the attention of the highest levels of the federal government. *See supra* at 3-6.

Aguillard does not stand for the proposition that evolution must be taught as the official orthodoxy of the state on the issue of life's origin. Instead, *Aguillard* holds that religion may not be advanced by banning evolution or, alternatively, requiring the teaching of a religious theory. The disclaimer does neither. Thus, the disclaimer is not "anti-evolution" at all, but reinforces the teaching of evolution in the public school curriculum, while clarifying that the government has no business imposing an official orthodoxy upon those who either decline to accept evolution, or who wish to harmonize it with "other concepts" of life's origin. Evolution is not discredited, but, in teaching it, religious or other beliefs are not intended to be disparaged; religious alternatives are not proposed, but the school system does disclaim its intent to impose a single, orthodox view of life's origin on its students. The Establishment Clause is not and should not be made an impediment to a school board's attempt to make all schoolchildren feel welcome in the school community.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BARRY W. ASHE
Counsel of Record
WILLIAM D. TREEBY
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON, L.L.P.
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

KENNETH F. SILLS
HAMMOND & SILLS
1111 South Foster Drive
Baton Rouge, LA 70806
(504) 923-3462

CHRISTOPHER M. MOODY
CASHE, LEWIS, MOODY
& COUDRAIN
106 South Magnolia Street
Hammond, LA 70404
(504) 542-6848

Attorneys for Petitioners

SUPREME COURT OF THE UNITED STATES

TANGIPAHOA PARISH BOARD OF EDUCATION ET AL.
v. HERB FREILER ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99–1625. Decided June 19, 2000

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting from denial of certiorari.

I

On April 19, 1994, the Tangipahoa Parish, Louisiana, Board of Education (Board) passed the following resolution:

> "Whenever, in classes of elementary or high school, the scientific theory of evolution is to be presented, whether from textbook, workbook, pamphlet, other written material, or oral presentation the following statement shall be quoted immediately before the unit of study begins as a disclaimer from endorsement of such theory.
>
> "It is hereby recognized by the Tangipahoa Parish Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.
>
> "It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion or maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise

critical thinking and gather all information possible and closely examine each alternative toward forming an opinion." Pet. for Cert. 2.

Approximately seven months after this resolution was adopted, respondents, three parents of children attending the Tangipahoa Parish Public Schools, brought suit in the United States District Court for the Eastern District of Louisiana against petitioners, the Board, its members, and the superintendent of the school district. They brought a facial challenge to the disclaimer contained in the last two paragraphs of the resolution, claiming that it violated the coextensive Establishment Clauses of the United States and Louisiana Constitutions. The District Court ruled in favor of respondents. 975 F. Supp. 819 (1997). It concluded that the disclaimer lacked a secular purpose, and thus failed the first prong of the three-prong test outlined in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), because the Board's articulated purpose—that it adopted the disclaimer to promote critical thinking by students on the subject of the origin of life—was a sham. See 975 F. Supp., at 829. It therefore held the disclaimer unconstitutional under both the Federal and the Louisiana Constitutions. See *id.*, at 830.

The Fifth Circuit affirmed. 185 F. 3d 337 (1999). It began by noting that, in the context of public education, this Court has used three different tests to evaluate state actions challenged on Establishment Clause grounds: the three-prong test of *Lemon*; the "endorsement" test of *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573 (1989); and the "coercion" test of *Lee* v. *Weisman*, 505 U. S. 577 (1992). See 185 F. 3d, at 343. Although noting that the *Lemon* test has been "widely criticized and occasionally ignored," the court opted to apply it. 185 F. 3d, at 344. The court first concluded that the disclaimer had a secular purpose and therefore survived the first prong of the *Lemon* test. See 185 F. 3d, at 344–346. While agreeing with the District Court that the purpose of promoting critical thinking by students on the subject of the origin of life was a sham, the court concluded that the disclaimer served two other, legitimate secular purposes: disclaiming any orthodoxy of belief that could be inferred from the exclusive place of evolution in the curriculum, and reducing offense to any student or parent caused by the teaching of evolution. See *ibid.*

The Fifth Circuit then turned to the second prong of the *Lemon* test—the so-called "effects" prong. See 185 F. 3d, at 346–348. The court concluded that the disclaimer failed this prong because "the primary effect of the disclaimer is to protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation." *Id.*, at 346. It based this conclusion on three factors: "(1) the juxtaposition of the disavowal of endorsement of evolution with an urging that students contemplate alternative theories of the origin of life; (2) the reminder that students have the right to maintain beliefs taught by their parents regarding the origin of life; and (3) the 'Biblical version of Creation' as the only alternative theory explicitly referenced in the disclaimer." *Ibid.* (Finally, the court noted, albeit in passing and without elaboration, that, because the disclaimer failed the second prong of the *Lemon* test, it would also fail the endorsement test. See 185 F. 3d, at 348.)

Petitioners unsuccessfully moved for rehearing by the panel and by the en banc Fifth Circuit. 201 F. 3d 602 (2000). Judge Barksdale, joined by six other judges, dissented from the denial of rehearing en banc. See *id.*, at 603–608.

II

Like a majority of the Members of this Court, I have previously expressed my disapproval of the *Lemon* test.

See *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 398–400 (1993) (SCALIA, J., joined by THOMAS, J., concurring in judgment); *County of Allegheny*, *supra*, at 655–657 (KENNEDY, J., concurring in judgment in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 346–349 (1987) (O'CONNOR, J., concurring in judgment); *Wallace* v. *Jaffree*, 472 U. S. 38, 107–113 (1985) (REHNQUIST, J., dissenting). I would grant certiorari in this case if only to take the opportunity to inter the *Lemon* test once for all.

Even assuming, however, that the Fifth Circuit correctly chose to apply the *Lemon* test, I believe the manner of its application so erroneous as independently to merit the granting of certiorari, if not summary reversal. Under the second prong of *Lemon*, the "principal or primary effect [of a state action] must be one that neither advances nor inhibits religion." *Lemon*, *supra*, at 612. Far from advancing religion, the "principal or primary effect" of the disclaimer at issue here is merely to advance freedom of thought. At the outset, it is worth noting that the theory of evolution is the only theory actually *taught* in the Tangipahoa Parish schools. As the introductory paragraph of the resolution suggests, the disclaimer operates merely as a (perhaps not too believable) "disclaimer from endorsement" of that single theory, and not as an affirmative endorsement of any particular religious theory as to the origin of life, or even of religious theories as to the origin of life generally. The only allusion to religion in the entire disclaimer is a reference to the "Biblical version of Creation," mentioned as an illustrative *example*—surely the most obvious example—of a "concept" that the teaching of evolution was "not intended to influence or dissuade." The disclaimer does not refer again to the "Biblical version of Creation," much less provide any elaboration as to what that theory entails; instead, it merely reaffirms that "it is

the basic right and privilege of each student to form his/her own opinion or maintain beliefs taught by parents on this very important matter of the origin of life and matter," and neutrally encourages students "closely [to] examine *each* alternative" before forming an opinion.

As even this cursory discussion of the disclaimer amply demonstrates, the Fifth Circuit's conclusion that "[t]he disclaimer . . . encourages students to read and meditate upon religion in general and the 'Biblical version of Creation' in particular," 185 F. 3d, at 346, lacks any support in the text of the invalidated document. In view of the fact that the disclaimer merely reminds students of their right to form their own beliefs on the subject, or to maintain beliefs taught by their parents—not to mention the fact that the theory of evolution is the only theory actually taught in the lesson that follows the disclaimer—there is "no realistic danger that the community would think that the [School Board] was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." *Lamb's Chapel*, *supra*, at 395. At bottom, the disclaimer constitutes nothing more than "simply a tolerable acknowledgment of beliefs widely held among the people of this country," *Marsh* v. *Chambers*, 463 U. S. 783, 792 (1983). See also *Lynch* v. *Donnelly*, 465 U. S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

In denying the petition for rehearing, the Fifth Circuit panel took another tack: "In denying rehearing, we emphasize that we do not decide that a state-mandated statement violates the Constitution simply because it disclaims any intent to communicate to students that the theory of evolution is the only accepted explanation of the origin of life, informs students of their right to follow their

religious principles, and encourages students to evaluate all explanations of life's origins, including those taught outside the classroom. We decide only that under the facts and circumstances of this case, the statement of the Tangipahoa Parish School Board is not sufficiently neutral to prevent it from violating the Establishment Clause." 201 F. 3d, at 603. Inasmuch as what the disclaimer contains is nothing more than what this statement purports to allow, the explanation is incoherent. Reference to unnamed "facts and circumstances of this case" is not a substitute for judicial reasoning. The only aspect of the disclaimer that could conceivably be regarded as going beyond what the rehearing statement purports to approve is the explicit mention—as an example—of "the Biblical version of Creation." To think that this reference to (and plainly not endorsement of) a reality of religious literature—and this use of an example that is not a contrived one, but to the contrary the example most likely to come into play—somehow converts the otherwise innocuous disclaimer into an establishment of religion is quite simply absurd.

In *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), we invalidated a statute that forbade the teaching of evolution in public schools; in *Edwards* v. *Aguillard*, 482 U. S. 578 (1987), we invalidated a statute that required the teaching of creationism whenever evolution was also taught; today we permit a Court of Appeals to push the much beloved secular legend of the Monkey Trial one step further. We stand by in silence while a deeply divided Fifth Circuit bars a school district from even suggesting to students that other theories besides evolution—including, but not limited to, the Biblical theory of creation—are worthy of their consideration. I dissent.